U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—THE PENTAGON PAPERS (PART 1)

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

FIRST SESSION

JUNE 23, 24, AND 25, 1971

Printed for the use of the Committee on Government Operations

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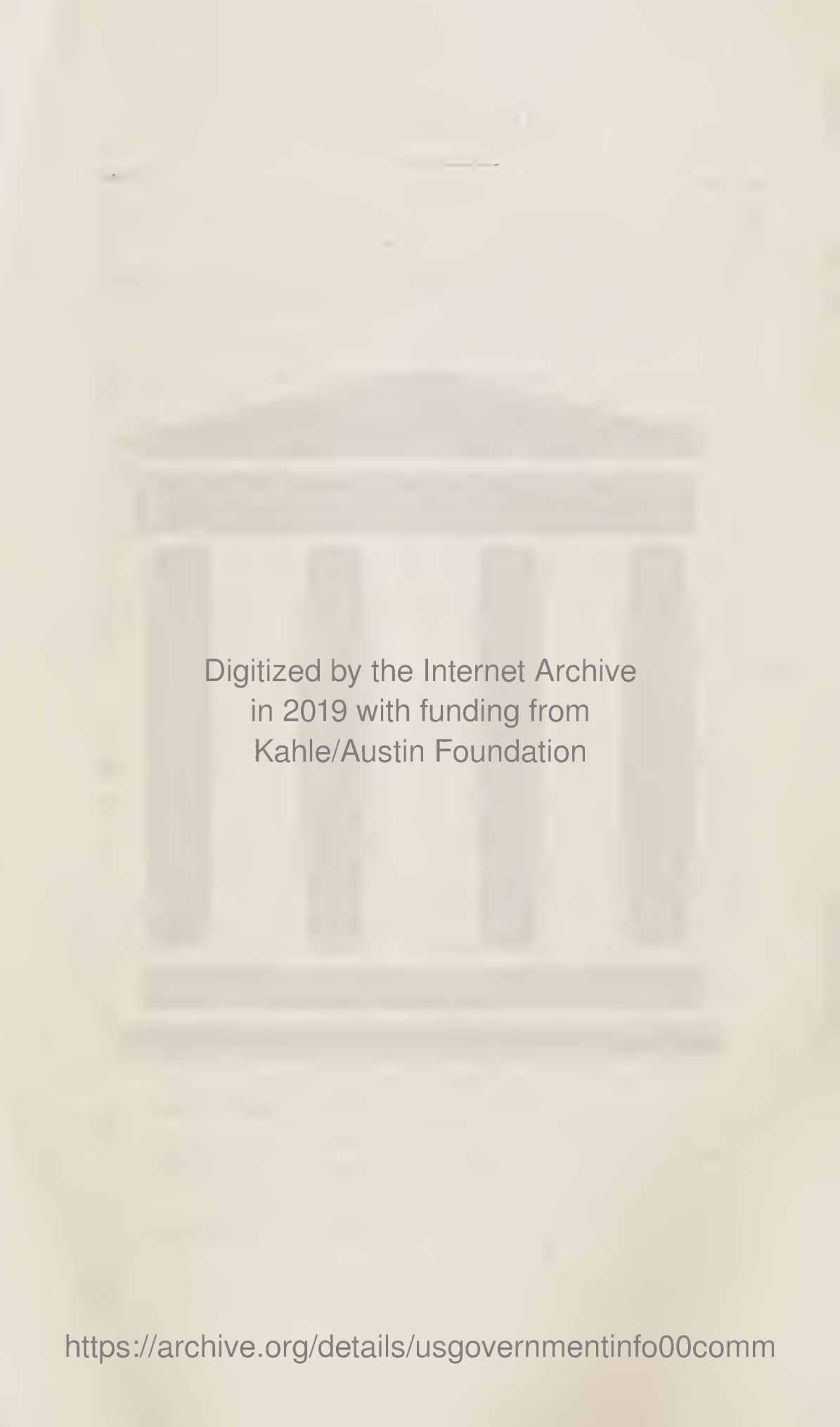

U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—THE PENTAGON PAPERS (Part 1)

WEDNESDAY, JUNE 23, 1971

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2247, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, John E. Moss, John Conyers, Jr., Bill Alexander, Ogden R. Reid, Frank Horton, John N. Erlenborn, and Paul N. McCloskey, Jr.

Also present: Representative Florence P. Dwyer.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; William R. Maloni, professional staff member; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

I would appreciate the cooperation of those in attendance in this room, it is small, and we need as much order as possible so that the subcommittee can hear the witnesses.

This morning we begin a most important and timely series of hearings on U.S. Government information policies and practices. The subjects with which we will deal are as old as the Constitution itself and as timely as this morning's newspaper.

Today we appear to be approaching a constitutional confrontation of such historic proportion as to endanger the equilibrium of our constitutional system.

On the one hand, there is the undoubted authority, implied in the constitutional grant of Executive power, to withhold information where its divulsion would constitute a clear and present danger to the national interests.

On the other hand, we have the ultimate right to know, implied in the preamble to the Constitution and in the Bill of Rights. Related to this is the right of the peoples' representatives in Congress to know so as to carry out their legislative duties imposed on them under article I of the Constitution—powers which include declaring war and funding the armed services.

As the Supreme Court of the United States has said (*McGrain v. Daugherty*, 273 U.S. 135):

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do.

The Supreme Court has also said (*Grosjean* v. *American Press Co.*, 297 U.S. 233):

Since informed public opinion is the most potent of all restraints upon misgovernment, the suppression of abridgement of the publicity afforded by free press cannot be regarded otherwise than with grave concern.

The function of this subcommittee and the purpose of these hearings is to determine whether or not the right of the people and the peoples' representatives in Congress to adequate information is being thwarted and, if so, to recommend legislation for procedural mechanisms to reestablish a proper balance between these shifting constitutional rights.

It is for this reason that we open these hearings with three distinguished constitutional lawyers headed by a former Supreme Court Justice.

At the outset of these hearings, I ask the indulgence of my colleagues and our invited witnesses for a few brief observations that I hope will be helpful in clarifying the ground rules for these sessions.

First, you will note that these hearings are to be broadcast and portions filmed for television, in accordance with new provisions of the House RuleXI, Clause 33, added by section 116 (b) of the Legislative Reorganization Act of 1970. A poll of the subcommittee members in accordance with rule 17 of our committee rules revealed that a majority did affirm radio-TV coverage. This procedure provided advance opportunity for the radio and television producers and directors to review the provisions of the House rules governing this coverage so that the high standards of dignity, propriety, and decorum may be maintained in these proceedings. I apologize for the crowded conditions today, but this hearing room was the only one available for our use today. Tomorrow and Friday, hearings will be held in a much larger hearing room, room 2128, Rayburn House Office Building—the Banking and Currency Committee room.

Secondly, as you know, we had planned to begin hearings this week on the matter of exchange rates and other economic subjects connected with South Vietnam, the economy and efficiency of our assistance programs in Southeast Asia. Because of the vital concern with recent events affecting our freedom of information mandate, we have postponed the Southeast Asia hearings until Thursday, July 8, immediately following the congressional recess.

Further, it should be made clear with what we will not be specifically concerning ourselves during these hearings. We are not interposing our legislative authority with respect to the specific questions involved in the New York Times, Washington Post, and other pending cases or decisions rendered by the district courts and the respective circuit courts of appeal. This segregation of issues is in the tradition of congressional respect for the judicial process and the constitutional separation of powers. I would therefore caution both the witnesses and members of the subcommittee to be diligent in limiting testimony, questions, and responses to the broader issues involved here.

Thirdly, all members are fully conscious of the important need to safeguard vital defense security information. Congress has enacted many laws to deal with this defense requirement; and such laws have been fully implemented by Executive orders and regulations to govern the classification, handling, dissemination, use, and declassification of such information. We will also fully explore the broad ramifications of this aspect of our Government information crisis.

Next, it should be noted for the hearing record that I wrote to Secretary of Defense, Melvin R. Laird, on Monday, June 21, 1971, requesting for the use of this subcommittee in connection with these hearings a full and complete set of all volumes making up the so-called history of the decisionmaking process in Vietnam. Without objection, I will insert a copy of this letter into the record.

Unfortunately, the Secretary has not chosen to comply with the subcommittee request, despite clearly established groundrules issued by President Nixon on April 7, 1969, to govern compliance with congressional demands for information. During the course of these hearings, we will also examine the extent of executive compliance with the Nixon memorandum. I will also insert into the record the full text of the President's April 7, 1969, memorandum, along with the correspondence between our colleague on this subcommittee, then Chairman John E. Moss, and the President on the same matter.

The subcommittee might wish to consider invoking its authority under section 2954 of title 5, United States Code, which provides a statutory right of the House Committee on Government Operations to require any executive department or independent establishment of the Government to furnish any information requested of it relating to any matter within the jurisdiction of our committee. Under this law, only a formal request signed by any seven members of our committee is required.

Likewise, I insert into the hearing record the text of the official Government Operations Committee news release that describes the purpose and scope of these hearings.

This subcommittee was established as the "watchdog" over freedom of information some 17 years ago. Under the brilliant leadership of my predecessor as chairman—Congressman John E. Moss, of California—the subcommittee has diligently exercised both its investigative and legislative authority in the freedom of information field. Over the years thousands of pieces of information have been pried loose by subcommittee efforts against bureaucratic redtape for Members of Congress, news reporters, broadcasters, scholars, and the average citizen. The subcommittee has, in effect, served as a Government information ombudsman for many years—long before that term came into common usage.

Investigative work of the subcommittee during the 1950's resulted in the release of a significant amount of information by the executive branch to the Congress—informataion vital to the discharge of our constitutional responsibilities. Subsequent work of the subcommittee led to improvements in the administrative machinery dealing with classified security material and the periodic downgrading of such information. Amendments by President Kennedy to Executive Order 10501 and his issuance of Executive Order 10964 in 1961 had been recommended by reports of this subcommittee.

Twelve years of solid investigative achievement were climaxed by the enactment by Congress of the "Freedom of Information Act" (5 U.S.C. 552) which became effective on July 4, 1967. The legislation advanced by our subcommittee under the leadership of Chairman Moss has helped to open the doors of the bureaucracy to permit greater freedom of access to nonexempt types of information in countless numbers of cases over the past 4 years.

We are also proud of the fact that this subcommittee has been equally diligent and persistent in fulfilling its government information mandate during the 9 years it has functioned with Republicans in the White House and the 8 years when Democrats controlled the executive branch. In word and deed—in operations and investigations—we are truly bipartisan in the exercise of our freedom of information duties and responsibilities to the House and to the public in general.

At this point in the hearing record, I ask unanimous consent to include several letters and other documents relative to these hearings. Without objection, so ordered.

(The material referred to above follows:)

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., June 18, 1971.

HON. MELVIN R. LAIRD,
Secretary of Defense,
The Pentagon,
Washington, D.C.

DEAR MR. SECRETARY: This is to request formally that you furnish this subcommittee, not later than close of business, Tuesday, June 22, 1971, with a full and complete set of all volumes making up the "history of the decisionmaking process in Vietnam."

These documents are required for subcommittee use in connection with the forthcoming hearings on U.S. Government information policies and practices, scheduled to begin at 10 a.m., Wednesday, June 23, 1971. For your information, I am enclosing a copy of the committee news release describing the scope and purposes of these hearings.

I am also enclosing the exchange of correspondence between President Nixon and Congressman John E. Moss, then chairman of this subcommittee, which sets forth the President's official policy and implementing memorandum for the heads of executive departments and agencies governing procedures to govern compliance with congressional demands for information. Under those procedures, the subcommittee is clearly entitled to receive the above captioned document, since the President has not invoked "Executive privilege" with respect to this document.

Please make certain that the copy furnished to the subcommittee contains the original physical markings, designations, notations, or group classification, and similar classification information required in the applicable Department of Defense instructions for "Security Classification of Official Information."

With best regards,

Sincerely,

WILLIAM S. MOORHEAD, *Chairman.*

[News release, House of Representatives, Committee on Government Operations, June 22, 1971]

Representative Chet Holifield, Democrat of California, chairman of the House Government Operations Committee, and Representative William S. Moorhead, Democrat from Pennsylvania, chairman of the Foreign Operations and

Government Information Subcommittee, today announced details of the subcommittee's hearings into the "broad principles involved in freedom of information under our democratic system." A list of prospective witnesses is attached.

The hearings will begin at 10 a.m., Wednesday, June 23, in room 2247, Rayburn House Office Building, and will continue on Thursday, June 24, and Friday, June 25, in room 2129 of the Rayburn Building, and on Monday through Wednesday, June 28–30, in a room to be announced later.

Hearings by the subcommittee, previously announced for the week of June 21 on the exchange rates in Vietnam and on the economy and efficiency of operations of various U.S. assistance programs in Southeast Asia, have been rescheduled to begin on Tuesday, June 6, after the congressional recess.

Over the past 15 years, the subcommittee has conducted numerous hearings and issued dozens of studies and reports on Government information matters, resulting in the enactment of the Freedom of Information Act that became effective 4 years ago.

Subcommittee Chairman Moorhead outlined the broad scope of the current subcommittee hearings. Subjects to be examined are:

A free press and first amendment rights under the Constitution as they are reflected in actual Government operations;

Prerogatives of the legislative branch for access to classified information from the Executive in order to fulfill its constitutional responsibilities as representatives of the American people;

The requirements of security classification over certain types of sensitive information to safeguard our national defense;

The need for citizens "right to know" to maintain an informed electorate;

The threat of governmental actions which impose prior restraints on the publication of certain types of information;

The requirements of Executive Orders 10501 and 10964, dealing with safeguarding of official defense information and present declassification procedures;

Increasing dangers of erosion of public confidence in Government, inherent in restrictions by the Executive on the free flow of information:

Suggestions on how present information problems in security classification cases can be more adequately handled in the public interest, either by the enactment of new legislation or by the improvement of present administrative machinery; and

Other constitutional and philosophical questions related to the growing crisis in U.S. governmental information policies and practices.

The initial hearing on Wednesday, June 23, will feature a panel of distinguished constitutional experts, who will present views on the various categories of the subcommittee's hearings. Members of Congress will testify on Thursday, June 24, to be followed on Friday, the 25th, by a panel of witnesses from all segments of the public media, including the American Newspaper Publishers' Association, the American Society of Newspaper Editors, the National Association of Broadcasters, the Association of American Publishers, Sigma Delta Chi, and the American Newspaper Guild.

Resuming on Monday, June 28, the subcommittee will hear witnesses on the question of classification and declassification procedures, including a review of the operations of Executive Order 10501, "Safeguarding Official Information in the Interests of the Defense of the United States," and Executive Order 10964, dealing with the automatic downgrading and declassification systems.

Tuesday and Wednesday, June 29 and 30, have been reserved for invited witnesses from the executive branch, including Secretary of Defense Laird, Secretary of State Rogers, Attorney General Mitchell, Presidential Assistant Kissinger, and Herbert G. Klein, Director of Communications for the executive branch.

Members of the subcommittee, in addition to Chairman Moorhead are: Representatives John E. Moss, Democrat of California; Torbert H. Macdonald, Democrat of Massachusetts; Jim Wright, Democrat of Texas; John Conyers, Jr., Democrat of Michigan; Bill Alexander, Democrat of Arkansas; Ogden R. Reid, Republican of New York; Frank Horton, Republican of New York; John N. Erlenborn, Republican of Illinois; and Paul N. McCloskey, Jr., Republican of California. Ex officio Members are Representatives Chet Holifield, Democrat of California, and Florence P. Dwyer, Republican of New Jersey.

Editors Note: These hearings will be open for live radio and television broadcast.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., January 28, 1969.

HON. RICHARD M. NIXON,
President of the United States,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: The claim of "Executive privilege" as authority to withhold Government information has long been of concern to those of us who support the principle that the survival of a representative government depends on an electorate and a Congress that are well informed.

As you know, some administrations in the past made it a practice to pass along to executive branch subordinates a discretionary authority to claim "executive privilege" as a basis to refuse information to the Congress. The practice of delegating this grave Presidential responsibility was ended by President John F. Kennedy when he restored a policy similar to that which existed under previous strong administrations, including those of Presidents George Washington, Thomas Jefferson, and Theodore Roosevelt. In a letter to the Foreign Operations and Government Information Subcommittee, dated March 7, 1962, he enunciated the policy as follows:

". . . this administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval."

President Lyndon B. Johnson informed the subcommittee by letter, dated April 2, 1965, he would continue the policy enunciated by President Kennedy. He stated:

"Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of 'executive privilege' will continue to be made only by the President."

In view of the urgent need to safeguard and maintain a free flow of information to the Congress, I hope you will favorably consider a reaffirmation of the policy which provides, in essence, that the claim of "executive privilege" will be invoked only by the President.

Sincerely,

JOHN E. MOSS, *Chairman.*

THE WHITE HOUSE,
Washington, April 7, 1969.

HON. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Knowing of your interest, I am sending you a copy of a memorandum I have issued to the heads of executive departments and agencies spelling out the procedural steps to govern the invocation of "executive privilege" under this administration.

As you well know, the claim of executive privilege has been the subject of much debate since George Washington first declared that a Chief Executive must "exercise a discretion."

I believe, and I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this administration, executive privilege will not be asserted without specific Presidential approval.

I want to take this opportunity to assure you and your committee that this administration is dedicated to insuring a free flow of information to the Congress and the news media—and, thus, to the citizens. You are, I am sure, familiar with the statement I made on this subject during the campaign. Now that I have the responsibility to implement this pledge, I wish to reaffirm my intent to do so. I want open Government to be a reality in every way possible.

This administration has already given a positive emphasis to freedom of information. I am committed to insuring that both the letter and spirit of the public records law will be implemented throughout the executive branch of the Government.

With my best wishes.

Sincerely,

RICHARD NIXON.

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

(Establishing a Procedure To Govern Compliance with Congressional Demands for Information)

The policy of this administration is to comply to the fullest extent possible with congressional requests for information. While the executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons executive privilege will not be used without specific Presidential approval. The following procedural steps will govern the invocation of executive privilege:

1. If the head of an executive department or agency (hereafter referred to as "department head") believes that compliance with a request for information from a congressional agency addressed to his department or agency raises a substantial question as to the need for invoking executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.

2. If the department head and the Attorney General agree, in accordance with the policy set forth above, that executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring Congressional agency.

3. If the department head and the Attorney General agree that the circumstances justify the invocation of executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

4. In the event of a Presidential decision to invoke executive privilege, the department head should advise the congressional agency that the claim of executive privilege is being made with the specific approval of the President.

5. Pending a final determination of the matter, the department head should request the congressional agency to hold its demand for the information in abeyance until such determination can be made. Care shall be taken to indicate that the purpose of this request is to protect the privilege pending the determination, and that the request does not constitute a claim of privilege.

RICHARD NIXON.

MARCH 24, 1969.

Mr. MOORHEAD. We are honored this morning to have three distinguished legal authorities to discuss the broad constitutional aspects of this historic question of the legislative and executive responsibilities and rights to security classified information and the rights under the first amendment that flow to the public as a whole through the exercise of freedom of the press guarantees.

Hon. Arthur J. Goldberg, as you all know, is a former Associate Justice of the U.S. Supreme Court, former Secretary of Labor, and also served as our Ambassador to the United Nations.

Prof. Joseph Bishop of the Yale University Law School is a leading expert in constitutional matters and the freedom of information field.

Hon. Lee White served as Special Counsel to President John F. Kennedy and participated in staff efforts which led to amendments to the Executive orders governing security classification and declassification matters. He subsequently served as Chairman of the Federal Power Commission and is presently an attorney here in Washington.

Mr. MOORHEAD. We will hear first Justice Goldberg, and then he will answers questions. We will then hear from Professor Bishop and Mr. White.

I think before we do that, we might as well proceed with the customary swearing of the witnesses.

(Witnesses Arthur J. Goldberg, Joseph Bishop, and Lee White were sworn by the chairman.)

Mr. MOORHEAD. Congressman Reid now has a statement to make.

Mr. REID. Thank you, Mr. Chairman.

I would like to most warmly welcome Justice Goldberg, Professor Bishop, and Mr. White to these hearings this morning, and also to say that I am delighted that Congresswoman Dwyer, the ranking member of the overall Government Operations Committee, can be with us this morning.

Mr. Chairman, we begin today an inquiry into a crisis of truth in government, a study of the improper exercise of the executive power bordering on dereliction. Nothing less than the balance between our coordinate branches of government and the protections set forth in the first amendment are being threatened. These hearings will focus on the withholding of information by the claim of executive privilege, the misclassification of information, and prior restraint of publication by the executive branch.

These issues raise fundamental constitutional questions, including the right of the public to know what its government is doing in their name and the right of the Congress to have access to information necessary to carry out its legislative functions. The Constitution secures to the Congress the untrammeled right to investigation, pursuant to its legislative function, and no unqualified claim of executive privilege should stand in the way of the exercise of that right.

If necessary, the Committee on Government Operations, in the exercise of its constitutional power, has the right to compel the attendance of any official or the production of any documents in the executive branch. It is my hope that out of this inquiry will be developed legislation or a constitutional amendment, should the constitutional considerations need clarification. The Congress and the people must reassert their right to obtain that information necessary to insure the accountability of the American Government.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Moss.

Mr. Moss. Mr. Chairman, I would like at this time to ask unanimous consent to insert in the record the text of a letter I addressed to Secretary Laird on June 18 requesting the documents upon which the press stories have been based. I asked that in view of the time factor that I be supplied with a response by 5 o'clock last evening. No response of any kind was made by the Secretary.

Mr. Chairman, I would like to observe further that this case in my judgment brings sharply into focus everything this committee has concerned itself with for 17 long years. It points up certainly the fact of the bipartisan nature of the arrogance of the executive department of our Government, feeling that only in the executive department is there the ability to protect the secrets of this Nation, to insure that the security of the Nation is being preserved. In doing so, the executive relies upon Executive Order 10501. I would just like to point out that that Executive order provides in section 1 for three categories of classification, three only. It says "no other designations shall be used to classify defense information, including military information as requiring protection in the interest of national defense except as presently provided by the statute."

Neither in the Executive order nor in any statute upon the books of this Nation is there the authority for top secret-sensitive classification, the classification imposed upon these documents. It is my understanding that throughout the documents there are many classifications other than top secret, secret, and confidential. I submit, Mr. Chairman, in context with the hearings this committee held about 10 years ago, that all of those other classifications were found to be invalid, the departments and agencies of the Government were urged to adhere at least to the Executive order of the President which they have not done.

Mr. MOORHEAD. Without objection, the letter will be made a part of the record.

(The letter follows:)

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 18, 1971.

HON. MELVIN R. LAIRD,
Secretary, Department of Defense,
The Pentagon, Washington, D.C.

DEAR MR. SECRETARY: I seek the release of certain documents consisting of 47 volumes entitled "History of U.S. Decisionmaking Process on Vietnam Policy." These documents were prepared in 1967–68, at the direction of the then Secretary of Defense Robert McNamara.

As a legislator called upon to make judgements and decisions regarding our foreign policy, I have a need to know the contents of these vital documents. As a citizen of the United States, I have a right to know the history behind our involvement in Vietnam.

Accordingly, I ask that you either send me or give me access to these 47 volumes, in accordance with provisions of the Freedom of Information Act. (5 U.S.C., sec. 552.) As you know, that act puts the burden of justifying withholding of government information squarely on the agency seeking to withhold and, in my opinion, your Department has not offered any legitimate justification to date.

Insofar as time is of the essence, I would appreciate your response by 5 p.m. on Tuesday, June 22, 1971.

Sincerely,

JOHN E. MOSS,
Member of Congress.

Mr. MOORHEAD. Mr. Justice Goldberg, would you proceed, sir?

STATEMENT OF HON. ARTHUR J. GOLDBERG, FORMER JUSTICE, U.S. SUPREME COURT

Mr. GOLDBERG. I consider it a great privilege, Mr. Chairman, and members of this committee, to respond to your invitation to testify on this matter of overriding national concern.

Often it takes a dramatic event to bring a serious public problem to national attention. In this case, the drama is virtually unprecedented: the most powerful government in the world has taken powerful newspapers into court. And as the world watches with fascination and incredulity, America is forced to confront constitutional and political questions of the utmost gravity in an atmosphere of crisis.

Some of these questions will be resolved by the Supreme Court of the United States. It would not be appropriate to discuss the precise legal issues awaiting judicial resolution and I do not propose to do so. But the broader questions of reconciling the needs of the government and the rights of the citizen to information on the operations of government are appropriate for discussion and resolution, consistent with

our Constitution, by this committee, by like committees, and by Congress at large. It is the broader philosophical questions which underpin our constitutional framework, rather than the narrower legal questions, that I should like to discuss this morning.

We are witnessing what some regard as a classic conflict between freedom and responsibility; between order and liberty; between the right of the public and their representatives to know—in the name and spirit of democracy—and the Executive's need to withhold—in the name of security. But, I believe, as I have said before—in a majority opinion of the Supreme Court—that "freedom and viable government are * * * indivisible concepts." *Gibson* v. *Florida State Legislative Commission*, 372 U.S. 539–546. They can be reconciled—they must be reconciled—if our form of government is to survive as it has done for almost 200 years.

In fact, I believe, these concepts are reconciled—in the Constitution itself. Chief Justice Hughes expressed our constitutional commitment in these words:

> [I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. (*De Jonge* v. *Oregon*, 229 U.S. 353, 365).

Given this premise, is there an orderly framework in which the rights and needs of the public, the press, Congress and the executive can be rationalized and reconciled? I think there is, on the basis of the following guidelines:

First, in mandating government by the consent of the governed, our constitutional system requires that the people be adequately and honestly informed about the great issues that affect their lives and welfare. If this means the government must, by and large, be conducted in a goldfish bowl, so be it, for in no other way can it retain the consent of the governed. The first amendment was conceived as a basic safeguard of the public's right to know, as well as the press' right to publish. Without the first amendment—indeed the whole Bill of Rights—we all know our Constitution would not have been adopted. A firm commitment was made at the time that there would be a Bill of Rights. The language of the first amendment in this connection needs recalling.

"Congress shall make no law * * * abridging the freedom of speech or of the press * * *." I would hope, as Justice Cardozo has felicitously said, that this "preferred right" on which all other rights rest will be preserved against further erosion. This provision also applies—while directed at the Congress—now by decisions of the Supreme Court, to the States and also to actions of the Executive.

Second, there is no possible justification that I can conceive for denying to Congress the information necessary to the performance of its duties. If the people have a right to know, their representatives have a need to know. Nothing can contribute more to the weakening of Congress and undue concentration of power in the executive than the latter's recalcitrance in sharing information with Congress. With adequate information, Congress under our constitutional framework can be the full partner which was envisioned in our separation of powers, in the evolution of policy and the resolution of our foreign and domes-

tic problems—this is what the Founding Fathers perceived. Without it, Congress cannot appropriately perform functions entrusted to it under our Constitution.

Third, as the history of civilization, ancient and modern, teaches, any government, including our own, has more to fear from a captive press than from a zealous press, more to fear from the journalistic apologist for an administration—any administration—than the journalistic antagonist of an administration. By commanding freedom for the press, our Constitution seeks to inspire responsibility by the press. As an essential safeguard, the framers of our Constitution vested in the courts the duty of assuring the constitutional freedom of the press as well as the orderly exercise of the Government.

All of us surely recall Thomas Jefferson's familiar dictum:

> The basis of our Government being the opinion of the people, the very first object should be to keep the right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate to prefer the latter.

Now Thomas Jefferson, one of our greatest Presidents, like many public officials ancient and modern can be cited to the opposite effect, and I notice he has been in some of the court proceedings. But this aphorism does contain a germ of truth. Fortunately in our history, with very few exceptions, we have not been compelled to make this choice and his choice. There was an episode in our history in which the Supreme Court has said the lesson of history is relegated properly to oblivion. In the first days of the Republic, Congress adopted an alien and sedition law and under that law people, the press, pamphleteers, were sentenced to prison. Fortunately they were pardoned, and that unfortunate episode is one that we have lived without for almost 200 years since then, and the alien and sedition laws, as the Supreme Court has said, could not pass constitutional muster.

Now we have a present impasse. I am profoundly convinced and I profoundly hope that we may not have to make this choice, for we cannot have a free press without a free government and we cannot have a free government without a free press.

But in the proper exercise of their respective roles, which are different and often collide, each must accord the other mutual respect if our Government is to avoid the exercise of its great strength to begin the descent into totalitarian rule.

I do not mean to suggest to this committee, which, as Congressman Moss has pointed out, has given thoughtful consideration to this entire subject for many years, that the Government does not require secrecy in the conduct of its vital operations, that each day's collection of confidential messages with foreign governments should be broadcast on the 6 o'clock news, or that the engineering details of advanced weapons systems must be published in the Congressional Record.

After all:

> * * * while the Constitution protects against invasions of individual rights, it is not a suicide pact. Similarly, Congress has broad power under the necessary and proper clause to enact legislation for the regulation of foreign affairs. Latitude in this area is necessary to insure effectuation of this indispensable function of Government. (*Kennedy* v. *Mendoza Martinez*, 372 U.S. 144.)

But also I believe that the principles I have outlined must be observed in any attempt to limit the free flow of information to the public.

Anyone who has ever served our Government has struggled with the problem of classifying documents to protect national security and delicate diplomatic confidences. I would be less than candid if I did not say that our present classification system does not deal adequately with this problem despite the significant advances made under the leadership of this committee and Congress in the Freedom of Information Act of 1966. I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place: another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time.

Moreover, whatever precautions are taken, leaks occur in a government of fallible men.

In short, the classified label in our experience has never been 100 percent respected.

Let me give a case in point. It is a personal matter. On March 15, 1968, when I was Ambassador to the United Nations, I made certain major policy recommendations relating to the cessation of bombing of North Vietnam in a cable to the President. My memorandum was marked for the eyes of the President, Secretary of State, and Secretary of Defense only. It had a high security rating. This was not the only one of such memos; there were others of similar import submitted from my vantage point at the U.N. prior to that date.

Through no disclosure of my own, this document has in recent months been discussed in two books of general circulation authored by former Government officials, and was the subject of comment by President Johnson in a television interview. Although its words may technically still remain classified, its substance has been disclosed and, I must say, without injury to any national security or diplomatic interest. Some of those with access to it have described it publicly, but the Congressman and the citizen, the scholar and the critic, the journalist and the student—all who wish to know what their Government has done and rightly so—are presumably still denied the right to see the document. Mr. Chairman, in view of the fact that the substance of this document has been made a matter of public record and debate without impairing national security, I can see no compelling reason why this committee and the public it represents and Congress at large or any interested committee of Congress, should not have access to the actual document and the ones that preceded it.

And as I reflect upon my 3 years at the U.N., I must conclude that nearly every other memorandum of mine to the President and other high ranking officials relating to Vietnam could safely be disclosed. I would welcome the general release of these and similar documents as an aid in informing Congress and the public.

Mr. Chairman, I regret exceedingly the confrontation which has come between the press and our Government. I am one who believes that we have had too many confrontations lately. In resolving this terrible dilemma, there is surely no easy solution. But there are ways in which all of us may proceed to preserve the vital balance between press, the Congress, the public, and the executive branch of the Government.

First, we presumably will receive guidance from the Supreme Court on the fundamental constitutional questions at issue.

Second, we should distill the best from among the various thoughtful proposals being advanced by Members of Congress, on the question of reforming our classification procedures. It is my own feeling that here is an area in which Congress should act to define more precisely what documents are properly to be classified, and the duration of any classification. The present system whereby the executive branch itself determines the rules for disclosure of its own documents has proved inadequate for keeping Congress and citizen informed. It would be appropriate, I feel, for Congress to draw upon the various proposals of its Members and others and lay down more specific guidelines.

Third, I believe that our statutes dealing with disclosure of information merit careful revision so that they may better conform to constitutional requirements as defined by the Supreme Court of precision and clarity. In such revision, we must bear in mind again what the Supreme Court has said:

> The first and fourteenth amendment rights of free speech and free association are fundamental and highly prized, and "need breathing space to survive." (*NAACP* v. *Button*, 371 U.S. 415, 433.) "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." (*Bates* v. *Little Rock*, 361 U.S. 516, 523. *Gibson* v. *Florida Legislative Investigation Commission*, 372 U.S. 539 at 544.)

Fourth, I can see no conceivable reason why the chairman of the appropriate committees of Congress cannot be furnished copies of executive reports and memorandums essential to the performance of congressional responsibilities under appropriate security arrangements. I am sure that the average constituent, the average member of the public, must be completely puzzled why access to certain such documents is denied to responsible Members of Congress when newspapers seem to have such documents in hand.

Fifth, I think the present impasse makes it imperative that a select committee of Congress conduct a special investigation into the causes and conduct of the war in Vietnam. Regardless of how the various lawsuits turn out, such an investigation is necessary to preserve public trust in the candor and competency of our public officials and, indeed, of our Government itself. This investigation should occur at an appropriate date fixed in the judgment of Congress and should be accompanied by public disclosure of those documents whose classification is no longer merited. I myself haven't the slightest doubt that such a select committee will carefully screen the documents to preserve necessary confidentiality. That is done in proceedings in Congress all of the time, where the Foreign Affairs Committee, the Armed Services Committee, other committees of Congress hold hearings and at various stages release or not release some material to the press. But I would put that power in the select committee. I also have no doubt that the public today, along with Congress, is entitled to know, subject only to genuine national and diplomatic security considerations, all that occurred leading to the momentous decisions of this tragic war. In fact, I see no escaping from this at the present time in light of what has occurred in recent days.

The composition of such a select committee would, I am confident, insure against political capital being made from its inquiries. And the experience and integrity of its members would be assurance that we would satisfy the need for disclosure without prejudice to true national security and diplomatic interests.

As the situation now stands in this matter, we live in the worst of all worlds: Fragmentary accounts appear in the press which may or may not tell the whole story. I do not know whether they do or not. I have never seen the Pentagon study, and never knew about it until I read about it in the New York Times. But all, it seems to me, should agree, including all Government officials involved, past and present, the public and the press, that it would be far better for our country that the whole story be told.

If such an inquiry occurs, it would be well to keep in mind Justice Brandeis' wise admonition that sunlight is the most powerful disinfectant—and if such an inquiry is held, I would hope it would be held in the spirit of another great comment by Justice Brandeis, and with your leave, I will quote it. This is the spirit, I think, in which such an inquiry must be held. It was the words he wrote in his concurring opinion in *Whitney* v. *California:*

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American Government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression, that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

This is what our Government is—or should be—all about.

Mr. Chairman, and distinguished members of this committee, I thank you again for this opportunity to appear before you and present my views on this most important subject, and commend this committee for assuming its role in bringing this subject to public discussion.

Thank you very much.

Mr. MOORHEAD. Thank you, Mr. Justice, for your eloquent, inspiring and intriguing statement. You have provided this committee a great deal of food for thought. It is a rare opportunity that we have before us a man who has the experience of dealing with classified material at the highest level of Government in international affairs and also has the experience of serving on the highest court in the land, the Supreme Court of the United States.

Mr. Justice, in 1962 this subcommittee, under the chairmanship of Mr. Moss of California, had the Library of Congress research the authority for Executive Order 10501. The Library reported that:

> An extensive search fails to reveal any statute which specifically authorizes the President to issue such an order.

The Library also stated:

> The extent of the President's constitutional power to control the disclosure by persons in the executive branch of the Government and to withhold informa-

tion from the Congress and the public has long been in controversy and was never fully settled.

Finally they concluded the solution depends on legislation to transmute the problem from one of unrestrained grace or discretion to one of law.

I take it from your testimony that you believe that a legislative solution reconciling these differences is (a) possible and (b) advisable. Is that correct?

Mr. Goldberg. Mr. Chairman, I certainly do. I think Congress ought to enact specific legislation in this area.

Mr. Moorhead. Would this take the form of a legislative enactment of something like Executive Order 10501, or would it be the machinery for appeals and the like?

Mr. Goldberg. I think that is in the purview of Congress. It would seem to me that Congress would want to lay down fairly specific guidelines. It may be necessary that based upon those guidelines there then would be room for implementing Executive orders authorized by the statute.

Mr. Moorhead. In a previous subcommittee report this subcommittee recommended that the President should "provide for a realistic independent appraisal against overclassification and unjustified withholding of information."

You testified that the present system whereby the executive branch itself determines the rules for disclosure of its own documents has proved inadequate in keeping Congress and the citizen informed.

Do you believe that when we review these matters of disclosure, nondisclosure, that there should be some congressional inputs such as a congressional board of classification experts to review the matter with the executive branch classification experts?

Mr. Goldberg. In my testimony I said there have been very thoughtful proposals that have been made. I had this proposal in mind, among those that have been made in the past and currently. I have thought about it. I didn't want to be more precise than that. But my own feeling runs in this direction, that we should have a combination of two things, a review board independent of the Executive, we would have to consider whether Congress wants to involve itself to that extent or whether it should be an independent board of citizens, and automatic declassification after a given period. This would be subject, of course, to the capacity of that board to declare that certain matters must be kept classified for a long period of time. So my own thinking leads to a combination of these various proposals.

Mr. Moorhead. Mr. Justice, in an earlier report this subcommittee recommended that the Secretary of Defense should direct the disciplinary action that should be taken in case of overclassification. Do you believe this should be done, and should it be made Government-wide by statute?

Mr. Goldberg. I think the basic problem, if I may say so, is the ambiguity in how you classify. I think if that ambiguity were clarified, if we had a precise statute, and if the leadership of the various Government departments made sure their directives were complied with the problem then could be handled.

Today, as I have said from my experience, the guidelines are so vague that there is an understandable tendency of Government officials, not wanting to compromise themselves, to overclassify.

Mr. Moorhead. Our subcommittee in the past made a recommendation that a few well-chosen secrets should be adequately protected rather than having a security system charged with unimportant, outdated material that in reality is no longer merited the protection of secrecy. I take it you would agree this would be a good guideline for any legislation we might recommend.

Mr. Goldberg. I certainly do.

Mr. Moorhead. Thank you, Mr. Justice.

Mr. Reid?

Mr. Reid. Thank you, Mr. Chairman.

Mr. Justice, permit me to thank you for your thoughtful and incisive comments dealing with the constitutional questions before us and some of the declassification questions.

I would like, if I may, to ask you three brief questions and, in asking the first, I am mindful of your concern and admonition about not being precise with regard to issues before the Court. But in line with your own presentation I wonder if you could not give us some philosophic comments on the question of prior restraint. Specifically, as I read *Near* v. *Minnesota* and the history of our country for nearly 200 years, a prior restraint has basically never been approved, and indeed in that case was held to be unconstitutional.

If a matter is not a clear and present danger, and if a matter is essentially a question of history as opposed to the operational plans of NATO, should we not be very zealous in guarding against the exercise of prior restraint by the Executive?

Mr. Goldberg. The answer is "Yes."

Mr. Reid. Second, let me ask you with regard to classification and executive privilege: There are Members in this body, and I believe the Senate Foreign Relations Committee shares the view that there has been a disproportionate and excessive reliance on Executive privilege. Chairman Moss I think has been perhaps the most thoughtful American in the Congress in this field in pointing it out.

It seems to me that the Congress' right to know in the pursuance of its legislative functions must indeed permit the Congress to get whatever information is necessary to that function. And you referred in your testimony to the necessary and proper clause. Would that not in your judgment both enable and be appropriate for the Congress' exercise of investigatory power in order to carry out its legislative function?

Mr. Goldberg. I think there is room for executive privilege in certain instances, but I think it has been overdone. I believe a statute which dealt with guidelines for the dissemination of Government information could address itself to this subject also.

I do not believe in an unbridled privilege for any branch of the Government. Too much discretion is not a rule of law. The words discretion and rule of law are antithetical concepts. But I must say we ought to recognize that all administrations have felt and have invoked this privilege.

I think first it ought to be dealt with congressionally and then, if we have to test out constitutionally the privilege, we all, of course, would abide by what the highest court in the land says about it.

Mr. Reid. In that connection two points. I think the record of this subcommittee has been made clear in the exchange of letters with several

Presidents that the executive privilege can only be invoked by the President himself as a matter of historic record here or should only be exercised specifically by the President. And should not the principle be that while the confidentiality of certain diplomatic discourses must be protected—and both of us have had that experience—that does not mean that the executive has the right to conceal or prevent information dealing with fundamental decisions and fundamental questions of fact from being presented to the Congress? Is not that one of the benchmarks?

Mr. GOLDBERG. I think Congress has the need to know. The people have a need to know. Congress represents the people. It is elected to represent the people. You need to know in order to carry on your duties.

I think the increasing antagonism that seems to have developed between the Congress and the Executive and the distrust which has developed between Congress and the Executive, is one aspect of our system which needs basic correction.

Mr. REID. Finally, Mr. Justice, it seems to me a principle that needs to be enhanced today is the question of fundamental accountability, accountability of the Executive to the American people and to the Congress. And I am concerned as a matter of principle that there are indications, altogether too plain, that the Executive from time to time has either practiced deception or has treated the Congress in a somewhat cavalier fashion.

Mr. Bundy, for example, said in one of his memorandums as published in the Times "We probably do not need additional congressional authority even if we decide on very strong action."

There clearly were differences of view over the Gulf of Tonkin matter. Secretary McNamara was asked at one point, "Mr. Secretary, can you give us the basic reasons for the Gulf of Tonkin patrol?"

"It is a routine patrol of the type we carry out in international waters all over the world."

Now we find from the record in fact there had been secret destroyer patrols to the north .

What I am asking, without being specific as to individuals: Does the Executive not have to be not only candid but clear and straightforward and not practice what seems to be inherent in some of these documents, a practice of not telling the Congress basically what is happening and, in some cases, clearly deceiving them?

It seems to me that runs against accountability.

Mr. GOLDBERG. Congressman Reid, part of what I conceive and why I think it is imperative now that the whole record, subject to this narrow exception that I think we would all agree upon, current troop deployments, no one in the Congress would say we should publish those in advance so the enemy would know what would happen in any combat situation, but I think in fairness to the officials themselves now as well as the public and Congress, the whole record ought to be made clear. I have thought that for some time. Because we would have to be camels putting our heads under the sand to not realize the extent of disillusionment which exists.

I happen to believe—I have had my agreements and disagreements with various officials of the Government, which is highly natural. But I happen to believe that it is highly important, therefore, that in a

situation fraught as this situation is fraught with concern, with the publication of the Pentagon Papers, that it is far better that the whole record be disclosed, and it is one of the burdens of occupying public life in the executive or in the Congress that you must be accountable to the public for what you do.

I think all involved are patriotic and basically decent men. That is not the question. The question is, What happened? Did the President get adequate advice? Did he follow the advice? Did he not follow the advice?

It is not new in our history that we explore these things. In this situation we are exploring it in the press. I think it would contribute a great deal if it were explored in the Congress with full access to all of the material, except for those things that I am sure no select committee would have much difficulty in deciding matters prejudicial to our present national security now, not just embarrassing to our Government or to officials, but prejudicial. And such matters could be excluded or discussed in camera, which has been done, I notice, in the court proceedings.

Mr. Reid. Would it be fair to say then as a principle that the Executive obviously has the right to protect the confidentiality of certain tactical decisions but it does not have the right to fail to present and consult with the Congress on historic and basic decisions that are fundamental to the future of the country and the congressional power to provide money and various other purposes?

Mr. Goldberg. Yes.

Mr. Reid. Thank you very much, Mr. Justice.

Mr. Moorhead. I yield to the father of this committee and probably the leading expert in the field of freedom of information in the Congress and in the country, Mr. Moss.

Mr. Moss. I thank the Chairman. I feel that there are no experts in the field of information. I wish there were.

Mr. Goldberg, it is rare that we have witnesses with such a rich background. I am inclined to refer to you as Mr. Justice, Mr. Ambassador, Mr. Secretary. I have observed your work in all three capacities.

You are bringing here a background of experience that is so rare in our Government. You have been deeply involved in domestic government, you have dealt with the problems of foreign affairs, you have sat on the highest court of this land and I wish you were still there.

Mr. Goldberg. Often I do, too.

Mr. Moss. On page 2 of your statement you quote from Chief Justice Hughes, "Imperative is the need to preserve inviolate"—not to violate it in any manner—"the constitutional rights of free speech, free press, and free assembly."

If the Justice Department can take the newspapers into court and enjoin them from publication, wouldn't the same doctrine underlie a right to take me into court and enjoin me from making a speech?

Mr. Goldberg. I don't want to pass upon the particular merits, but in answer to your question, the citizen enjoys the same right as the press. The first amendment so says.

Mr. Moss. And I could be so enjoined, at least on the basis of the precedents of the moment?

Mr. Goldberg. That is what——

Mr. Moss. Without passing on the merits?

Mr. Goldberg. That is what the Government is asserting. As I said, I don't want to pass upon the arguments made back and forth, but I think what Chief Justice Hughes says expresses the philosophy of our constitutional scheme.

Mr. Moss. And a church could be enjoined?

Mr. Goldberg. Yes, a church is entitled to the protection of the Constitution. And the restrictions.

Mr. Moss. So we have an issue here far more than the freedom of the press. We have the first amendment freedoms in their entirety.

Mr. Goldberg. Yes, Congressman.

I hope I made clear the preferred status of the first amendment, including that of the press, because the first amendment is designed to protect the right of the citizen to know. And, of course, to me that naturally includes the right of the citizens' representatives assembled in Congress. They have elected you for that purpose among others.

Mr. Moss. On page 8 you quote from *Bates* v. *Little Rock:*

> Freedoms such as these are protected not only against heavyhanded frontal attack but also from being stifled by more subtle governmental interferences.

A week lost on the right to publish. It has always been my conviction that that first amendment said that you have the freedom to publish. It didn't say that the press was then relieved of answering for what it published. But prior restraining, naked censorship, was prohibited.

Mr. Goldberg. In answering that, Congressman, as I said, I don't want to enter into the legal aspects now before the Supreme Court.

I assume, however, if we had a declared war under the Constitution that if there was an impending troop movement and somebody was going to sound off about it, perhaps steps could be taken to safeguard the security of the troops.

Mr. Moss. We had some who wanted to take action against the Chicago Tribune.

Mr. Goldberg. If I remember, that publication was before the declaration of war, was it not?

Mr. Moss. Yes; it was.

Mr. Goldberg. Following the declaration of war, I don't recall a single instance of where our Government or the press or any responsible citizen ever revealed information advantageous to the enemy.

Mr. Moss. Clearly the framers of our Constitution had in mind the need for secrecy in one of the three coequal branches because they gave the Congress of the United States the right to keep secret those portions of its journals which in its judgment required secrecy. But it gave none of that to either of the other coordinate branches of the Government, did it?

Mr. Goldberg. Not expressly. The question, Congressman, would arise whether under the power to declare war, the foreign relations power, the necessary and proper clause, that power could be inferred. But it would have to be reconciled with the first amendment. It doesn't exist in abstraction.

Mr. Moss. Now, in your experience in the Department of Labor, and as Ambassador of the United States to the United Nations, you had to deal with classified information. You had to originate it. You had to understand 10964, you had to spell out a schedule for downgrading it.

Isn't it true, Mr. Ambassador, that we have classifications which themselves are classified?

Mr. GOLDBERG. Yes.

Mr. MOSS. And that is contrary completely to the clear language of Executive Order 10501, isn't it?

Mr. GOLDBERG. I haven't studied that aspect of it.

Mr. MOSS. I have for many years.

Mr. GOLDBERG. It is clear there are classifications which are not known, not generally known.

Mr. MOSS. I would be almost willing to wager that the documents in question haven't an automatic declassification schedule stamped on them, which also violates the guidelines.

Mr. GOLDBERG. Yes. And I doubt very much whether—not, again, out of honesty and pressure of business—whether the declassification machinery which is established operates effectively. I don't think it does.

Mr. MOSS. You expressed far more confidence in the classification system than a panel of our flag officers, commenting on the Coolidge Commission report in about 1957 or 1958, before this subcommittee. It was the consensus of that group of flag officers that between 90 and 95 percent of the classified information possessed by our Government was either overclassified or needlessly classified.

Mr. GOLDBERG. I am very conservative, then, in my estimate.

Mr. MOSS. You are very conservative. Well, I want to join in the expressions of the chairman and Mr. Reid. I think your statement is an excellent one. I think it is helpful in bringing sharply into focus the nature of this constitutional crisis in our Government. I concur the Congress should immediately move to become involved in developing the answers and instituting a system of law for this gerry-built structure of classification and so-called security protection under which we now operate.

Mr. MOORHEAD. Mr. Horton.

Mr. HORTON. Thank you, Mr. Chairman. I, too, want to join with the other members in thanking Mr. Justice Goldberg for being with us this morning and giving us the benefit of his many years of experience in this field. In the course of your statement, and also in answer to questions, you indicated that you felt that there was a need for legislation in this field. With regard to Executive Order 10501, do you feel it is adequate under the circumstances, and if not, where is it inadequate?

Mr. GOLDBERG. I don't feel it is adequate. I would feel it would be far more appropriate, again without arguing the constitutional basis—Congressman Moss has his decided views, but this may be argued in court and I want to not express a legal judgment—I would feel it would be much more appropriate to have a solid congressional statute which provides the foundation for the Executive order and which gives guidance to the executive by delegation of authority under the statute about the classification procedures.

Mr. HORTON. I understand that. The question asked, however, is do you feel that the provisions of Executive Order 10501 are adequate, or do you feel it needs additions to it?

Mr. GOLDBERG. No. I think it needs revision.

Mr. HORTON. In what respect?

Mr. GOLDBERG. I think the Executive order needs revision in furnishing more specific guidance than it does. You cannot just have general terms as are in the Executive order, you know, national security, and other words. You have to be more precise in your instructions to Government officials.

I would prefer, for example, even in the Executive order, if Congress provides the basic legislation, automatic declassification and other devices which might be used in the Executive order.

Mr. HORTON. You also indicated during the course of your statement the need for a select committee which would examine documents. Would you spell out a little more specifically what you had in mind there?

Mr. GOLDBERG. Yes. I think we would just ignore basic reality if we do not face up to the fact that the country at large is profoundly disturbed about the present situation.

Now we are in the worst of all possible worlds. Without having responsible committees of Congress deal with the problem, the press, arguing that they have a right to do so, are publishing a lot of material.

As I said, I have never seen the Pentagon report. The press says it doesn't have all of the material. Well, I think the public now is entitled to have before it all material relating to this tragic war except such as in the opinion of the responsible representatives of the people relate currently to questions of security and confidentiality of diplomatic communication.

I think our country, No. 1, would vindicate its democratic tradition and I think our people would feel their Government levels with them.

Mr. HORTON. What would be the purpose of this select committee? To declassify documents?

Mr. GOLDBERG. The purpose of the select committee would be to review it, make its own appraisal of the situation——

Mr. HORTON. Are you talking about specific documents——

Mr. GOLDBERG. No; the whole situation.

Mr. HORTON. Policies?

Mr. GOLDBERG. Yes. But in connection with it, the select committee should consider the classification problem.

Mr. HORTON. Why couldn't this committee do it rather than have to have a select committee?

Mr. GOLDBERG. I don't want to enter into jurisdictional disputes in the Congress.

Mr. HORTON. You are suggesting a separate committee and I wondered why you choose that vehicle.

Mr. GOLDBERG. I did because I think both the Senate and the House should be involved.

Mr. HORTON. You are talking about a joint select committee then.

Mr. GOLDBERG. Yes.

By the way, I ought to say this is not a new proposal of mine. About a year ago I chaired a committee of the United Nations Association of which I was then the chairman, and in a panel report, joined in by many prestigious Americans, we suggested a joint committee of Congress to review the President's State of the Foreign Affair Report and conduct exhaustive hearings so Congress could perform its essential functions in the foreign affairs field. This suggestion of mine

today is quite related to that, although it is confined to this particular subject.

Mr. HORTON. Do you believe that the method by which information is obtained should or would have any effect on the decision as to whether publication should be restrained? For example, by theft from public or private sources, by bribery of public officials or business employees, or by illegal conspiracy, from foreign sources or as a result of accidental loss?

Mr. GOLDBERG. That is an issue pending before the courts and I would not want to comment on it. The courts will decide it. That is a legal issue which is being argued in the case.

I can explain why, Congressman. I cannot avoid the fact that I did sit on the Court and an expression of my own, if I made it on that issue, I think more properly ought to be addressed to the Court as a friend of the Court since it is an issue in the case.

Mr. HORTON. The court decisions do concede that prior restraint may be exercised in certain cases to prevent the publication of information which is undoubtedly of great importance to the national security. It would seem this would include information on troop movements, and you mentioned that, military weapons and installations, war plans, and other types of information. What do you think is the rationale behind these exceptions and do you agree with them?

Mr. GOLDBERG. Well, I have said I do not think the Constitution of the United States is a suicide pact and I believe that. I said it on the Supreme Court. We have a right to protect ourselves as a Nation. The question is how best do we protect ourselves consistent with our constitutional requirements.

Our Constitution is frequently very inconvenient for Government officials. I found it inconvenient sometimes in performing my functions as Secretary of Labor. It imposes restraints upon Government in the interests of an individual. It was not intended to be for the convenience of Government. It was intended to be for the protection of the individual.

As I tried to say, we avoided the collision course on which we are now engaged during World War II by an agreement with all of the newspapers and the Government. Now we have a collision.

Prohibition of prior restraint is the overriding doctrine under the first amendment. Whether or not a court would say that the other provisions of the Constitution would warrant a restraint on something presenting a clear and present danger is another matter.

Mr. HORTON. In your opinion can prior restraint be validly exercised to prevent the destruction of certain generally recognized private rights; for example, invasion of privacy by the disclosure of the contents of Government-held or private medical files and other confidential information such as may be involved in the lawyer-client, doctor-patient, and priest-confessor relationships?

Mr. GOLDBERG. Yes.

Mr. HORTON. How about the illegal publication of literary property or trade secrets?

Mr. GOLDBERG. That is commonplace.

Mr. HORTON. Publication of information gathered in confidence and protected by statute such as the contents of income tax returns?

Mr. GOLDBERG. Yes; that is specifically provided by congressional legislation.

Mr. HORTON. What about during the years that you were Secretary of Labor, did you have occasion to classify and declassify documents?

Mr. GOLDBERG. Yes; and as U.S. Ambassador also.

Mr. HORTON. I was going to ask about that separately.

With regard to the Secretary's job, did you have occasion to classify things?

Mr. GOLDBERG. Not very often because we were in the domestic area and I do not recall that I classified very much. But I assume that I did.

Mr. HORTON. Did you have any system at that time for declassification?

Mr. GOLDBERG. Yes; we did.

Mr. HORTON. What was the system?

Mr. GOLDBERG. I do not recall specifically at the moment how it was set up. I think I delegated that responsibility.

Mr. HORTON. You had a procedure?

Mr. GOLDBERG. Yes.

Mr. HORTON. Did that come to your attention?

Mr. GOLDBERG. I was the responsible official and it did. But I cannot say at the moment. It is now 11 years ago and I do not recall.

Mr. HORTON. As Ambassador to the United Nations you were in a position to classify and declassify. Again I would like to inquire with regard to the procedures for classification and declassification.

Mr. GOLDBERG. That went to the State Department. They did that.

Mr. HORTON. You had nothing to do with it?

Mr. GOLDBERG. No; but we classified our own communications to the State Department and to the executive branch. Declassification procedures were done in the Department of State.

Mr. HORTON. Were you consulted with regard to declassification of documents during the time you were Ambassador?

Mr. GOLDBERG. Not that I can recall.

Mr. HORTON. Did you ever make any recommendations with regard to declassification of documents?

Mr. GOLDBERG. Not that I can recall.

Mr. HORTON. Do you think that this is important?

Mr. GOLDBERG. Yes.

Mr. HORTON. I mean to make recommendations as Ambassador.

Mr. GOLDBERG. Yes.

Mr. HORTON. Did you suggest that you should make recommendations with regard to declassification of documents?

Mr. GOLDBERG. I do not think I did.

Mr. HORTON. Do you know of any declassification of any documents during the time you were Ambassador?

Mr. GOLDBERG. Oh, when I said I did not, I always, in conversation with the high officials of the Department, said I did not see the purpose of overclassification since I read about much of classified material in the morning newspapers. So in that sense, I did frequently say that I thought we were encumbered both with too many reports which were insignificant, which we read about in the papers, and also with a cumbersome procedure. But that was not my responsibility.

Mr. HORTON. If you had to draw a line around what should be classified, what would be the reasoning that you would give for classification?

Mr. Goldberg. I would try to define a very difficult task—I am not saying and I hope I am not being understood to say this would be an easy task to define this. But the essential element of a classification machinery is the national security and diplomatic intercourse of the country. But that does not mean, for example, all diplomatic intercourse. In the London Times, the former Prime Minister of Great Britain, Harold Wilson, is writing his memoirs and declassifying a lot of our documents. I do not believe that this will impair our diplomatic relations with Great Britain.

I am sure Prime Minister Heath does not like his predecessor doing this, but it is being done. I am reading it with great interest, just as I read the others, because I am finding out things I did not know about when I was supposedly a high ranking diplomatic official of our Government.

Mr. Horton. I have no more questions at this time.

Mr. Moorhead. Mr. Alexander.

Mr. Alexander. Mr. Justice, I too would like to express my appreciation for your excellent statement. I might say in the finest tradition of constitutional democracy.

I find myself in a very unusual situation asking a former Justice of the Supreme Court questions. Normally it is the other way around, Mr. Chairman.

Mr. Justice, I was not clear on the full scope of the proposed review board which you discussed a minute ago. Would this board pass on the classification or the declassification of documents soon after that act had been performed by the executive branch?

Mr. Goldberg. I had not thought it out to that extent, Congressman, but obviously you cannot have a board pass upon it before classification. Ambassadors have to classify documents which they send out daily. So do commanders in the field, et cetera. And Government officials exchanging memoranda have to do the same.

I thought that within reasonable limits an independent board ought to review the documents, the important documents. There are many documents, but we are talking about very important documents such as the ones in controversy which obviously are very important. I would think they could meet periodically and look at it.

But as an incentive to real decisionmaking, even of an independent board, my own thought leads to an automatic declassification after a stated period of time unless classification is renewed.

Mr. Alexander. Mr. Justice, I have a copy of a memorandum which was forwarded by the President on April 7, 1969, to the executive departments and agencies. In this memorandum is contained the following language:

> The executive branch has the responsibility of withholding certain information, the disclosure of which would be incompatible with the public interest.

Based on your experience and assuming you were now a member of the Cabinet, how would you interpret this language?

Mr. Goldberg. I think it is too vague. Public interest is too broad and sweeping a term. I think it requires more precise definition.

Mr. Alexander. Thank you.

Thank you, Mr. Chairman.

Mr. Moorhead. Mr. McCloskey.

Mr. McCloskey. Thank you, Mr. Chairman.

Mr. Justice Goldberg, I want to compliment you on your statement and I would like to limit my questions to the matter of the Congress' right to know rather than this issue that is now in a confrontation between the press and the executive branch.

You started the paragraph on page 3 of your statement with the statement "There is no justification for denying to Congress the information necessary to the performance of its duties."

To this committee and also to the Senate Foreign Relations Committee the executive branch of Government has declined thus far to release this 47-volume study that is the subject of some controversy.

The indication is this study was completed in 1968 and referred to the time interval between 1945 and 1967. Can you conceive, from your recollection or knowledge of the operations of the executive branch of Government, any reason whatsoever why the executive branch should deny to the Congress today, in 1971, this complete study of the period 1945 to 1967?

Mr. GOLDBERG. I do not know the reason. I read in the paper what the executive branch has said, that it is detrimental to our national security and diplomatic security. I will use those terms together.

Now, Congressman, I am sure you would agree with this: It would seem to me we would be in a better position as a nation if a study of this character had been submitted to responsible committees of Congress. had been reviewed under, as I said, appropriate safeguards, had appropriate deletions been made relating to any current problems of diplomacy and security, and then had the public been appropriately advised.

This is my concept. We are dealing largely here with a historical record.

Now, the history has not been completed, unfortunately, or is not at an end. And that presents problems. But even that problem could be handled by responsible committees of Congress in terms of what is done.

One of the things that bothers me very much, as I have said, is we have alienation in our country of many elements, young and old. I do not think it serves the cause of our country very much to have alienation between Congress and the Executive.

Mr. MCCLOSKEY. Mr. Justice Goldberg, you have commented upon the obligations of the Congress and the constitutional derivation of the separation of powers. The Constitution gives us the power and the responsibility to provide for the common defense, to fund a standing army, and to declare war. These were not only responsibilities imposed on the Congress, but they were limitations placed on the executive branch. These responsibilities were imposed on the representatives of the people elected every 2 years, or every 6 years in the case of the Senate.

Can you tell me how we can meet these responsibilities if the executive branch conceals information relevant to these decisions on the common defense from the Congress?

How can we meet our own constitutional responsibilities if we permit them to conceal information?

Mr. GOLDBERG. Again I haven't seen the papers, and I was a member of the executive branch and didn't see them. But I cannot conceive that Congress can carry out its duties unless it is adequately informed.

Now, it is true, Congressman Reid and others asked about the executive privilege, I might extend it a little broader than Congressman Reid by putting in an example:

If the President is to be protected, I presume those who talk to the President must be protected, otherwise the President is not protected, because if you then call a witness and you say, "What did the President say to you, and what did you say to the President," then the President has no privilege. The President must be permitted to function, too.

I hope nothing I have said indicates that I don't believe the President is not to function. But in direct answer to your question, with the enormous responsibilities and the duties that are imposed upon Congress, you cannot perform those duties unless you are adequately and candidly informed, not about every detail, but about the great policy decisions that are being made.

Mr. McCloskey. That goes to the very heart of the matter, because if executive privilege, which as I understood President Eisenhower's original order, was intended so that Government employees in the executive branch would not be inhibited in their advice to one another by having those memoranda ultimately made public. This was the basis for executive privilege, not for the purpose of concealing information from the Congress, but for protecting Government employees, so that their advice to one another might be uninhibited, candid, and hopefully accurate, without fear of public reproduction.

Let me quote from one such memorandum which was not revealed until it was published in the New York Times. This was Mr. McNaughton, the Assistant Secretary of Defense, to the Secretary. He said this:

Our aims in South Vietnam—This was 1965, before Congress authorized the escalation of the war or the commitment beyond the first 22,000 troops:

> Seventy percent to avoid a humiliating U.S. defeat, to our reputation as a guarantor of the South Vietnamese, 20 percent to keep South Vietnam and adjacent territory from China's hands, 10 percent to permit the people of South Vietnam to enjoy a better, freer way of life.

In your judgment, if prior to the commitment of our troops, the American people had been aware that our aims in Vietnam were only 10 percent to protect the South Vietnamese and 70 percent to preserve ourselves from humiliating defeat, would the Congress of the United States have permitted this war to escalate as it did?

Mr. Goldberg. I do not know what the Congress would have done. That, Congress would be in a better position to state than I. Congress' view, like some in the executive, has also changed as events have changed. I think we all have to be candid about that.

A long time ago I proposed—I should have included this in the statement—what I would hope could be done in our country and I think it can be done consistent with our Constitution. That is to invite Cabinet officers with responsibility to make statements on the floor of Congress and be subject to questioning, not only in committee, but before the whole Congress. I would think this would be a welcome development, consistent with our Constitution and our democracy. I can see no reason why it cannot be done.

Now the committee system of course is good, it serves that purpose partially, but it is not quite the same as standing up there before the

whole body and having a question put as a parliamentary system and answering it. I myself would have welcomed that.

Mr. REID. If my colleague would yield, I would merely say I totally agree with that. As the Justice may know, I have introduced a bill for a number of years to effectuate that and to really have a sense of prompt and necessary accountability before the whole Nation. It could only be accomplished in my judgment on the floor of the House and Senate in the same way.

Mr. GOLDBERG. Yes.

Now, Congressman McCloskey, you quoted John McNaughton; he was a fine man; he is dead and cannot answer the allegations against him. I knew him quite well. One of the reasons for my saying that the whole record ought to be made is that the whole story can then be told; McNaughton made other statements and he filed other memorandums. It would be only fair to have his entire position all laid on the record. And it would be a good thing to debate whether the position of the United States as a great power requires us to persist in an untenable situation. That is a legitimate issue to debate.

My real feeling is that it was never thrashed out and adequately debated under our system, and it should have been.

Mr. MCCLOSKEY. Mr. Justice, you mentioned that your own memorandums as American Ambassador to the United Nations, have subsequently been published, although, presumably they held top secret security classifications at the time they were issued.

Mr. GOLDBERG. It has not been published in haec verba, but it has been fully described, so that you and the public might as well have the full words. And nobody consulted me about the disclosures. I would have gladly agreed to publication of the memorandum—after all, I wrote it. I would have gladly agreed, publish the whole thing or make it available to Congress, certainly.

Mr. MCCLOSKEY. This is the point I raise. I have a book by Townsend Hoopes here, former Under Secretary of the Air Force, called "The Limits of Intervention." He quotes haec verba a memorandum he gave to Mr. McNaughton during the conduct of the Vietnam war. He refers not in haec verba, but to a memorandum, in which he discusses the classification system, and he mentions at page 169, for example:

> By the time of Tet, the Koreans had 48,000 tough combat soldiers in Vietnam, by far the most impressive demonstration of responsive concern by an Asian nation. This stout-hearted effort was of course totally underwritten by the United States—indeed on terms so generous that the Administration found it necessary to cover them with a rather dubious security classification.

Then he discusses exactly what they did. Well that discussion affects employees of the U.S. Government, including President Johnson, and is now written in a book. If they are ready to discuss the memorandums that went back and forth under this executive privilege, how in the world can the Congress act properly, enact laws for the common defense, or to protect the common defense if we, under the guise of executive privilege, are denied the same documents that are published for the general public?

Mr. GOLDBERG. Congressman, if you look in the index, you will see a reference to Arthur Goldberg on March 15, he is one of the two authors I referred to. And my answer to you is what is the sense then? He describes it, I must say very accurately. Mr. Hoopes does not

distort what I said. But if that is so, why shouldn't this committee, any responsible committee of the Congress, have the full text, all of the words?

Mr. McCloskey. As I understand your testimony, you feel this committee and this Congress have a duty to demand the full set of documents in the possession of the Secretary of Defense?

Mr. Goldberg. I again don't want to enter too much into the details of that aspect, but I have said I see no possible sense at the present time and I find it rather ironic that a set of documents would seem to be floating all around the newspaper world, from Maine to California, but are not in the possession of the Congress of the United States—that simply does not make sense to me.

Mr. Horton. Would the gentleman yield a moment?

Mr. McCloskey. Certainly.

Mr. Horton. I wanted to go back to your answer to the earlier question of Mr. McCloskey, where you made some comment with regard to declassification. You referred to Mr. McNaughton and a memorandum that you wrote while you were Secretary. Do you feel that there should be some individual right to declassify?

Mr. Goldberg. No; I think the Congress ought to prescribe the ground rules subject to implementation by the executive.

Mr. Horton. There has been, apparently, an individual right to declassify; it can amount to a right to declassify, because they seem to believe that it is something that belongs to them as an individual.

For example, they write a book——

Mr. Goldberg. But here is the dilemma. When I said no, I should have been more precise myself. First of all, everybody does it in writing memoirs. I cited Prime Minister Wilson as an example. And Britain has much more stringent laws. Further you cannot lock up a man's mind. I do not have to refer to that classified document that I am referring to. I can recite what I said. You cannot classify my mind. And if I were to write, as I have been asked to do and I have declined to do it up until now, I certainly could write in general about my various memoranda without quoting the exact text.

That presents part of the dilemma, because memoirs are written—I think, that is not to be condemned, but rather is to be commended for it is part of the information process—but under an appropriate law, properly drafted, which would only restrict dissemination of information to really vital material, then this problem would not arise. Former government officials could write, they could say what they did; they could be critical or congratulatory of their own or other activities, and we would not be in the impasse we are in now. We are in an impasse for want of appropriate guidelines.

Mr. Horton. What you are saying is that there is a dilemma facing an individual once he is out of office. If he had access to classified information, he must decide whether or not it is in the interest of national security to make information public. In other words, he has to make the decision as to whether he should or should not publish it?

Mr. Goldberg. Pretty much. I can't conceive that it violates any law for a man to say, "I took this essential position," without referring to any document, "throughout my experience in the Government." It would be absolutely foreclosing a man beyond what any of us I think would tolerate in the conduct of an individual. He knows what he did

and what he thought. He may not remember every detail, but he does know that.

Mr. HORTON. I thank the gentleman.

Mr. MCCLOSKEY. Mr. Justice, I want to return to what I think is the hardest, toughest constitutional point involved. That is the question of a study that is now 3 years old.

Your answer, as I understood it, is that without knowledge of the contents of the study, you were not prepared to say the executive branch must release it to the Congress. Do I understand your testimony correctly?

Mr. GOLDBERG. No; with all respect, I haven't said that.

Mr. MCCLOSKEY. Then I take it you feel that this should be released?

Mr. GOLDBERG. I said at the present time it makes no sense not to release it to Congress.

Mr. MCCLOSKEY. Makes no sense. But I am driving at the constitutional obligation here of the executive branch.

Mr. GOLDBERG. That is being argued in court and I have said——

Mr. MCCLOSKEY. The question before the court is with respect to the press. I am directing my attention to the Congress.

Mr. GOLDBERG. The Congress? Well, I think, as I understand the position of the government, that issue is also involved. They are taking the position that they have a right to retain that in the executive branch, against anyone.

Mr. MCCLOSKEY. The Constitution provides in article 1, section 5, "Each House shall keep a journal of its proceedings and from time to time publish the same, except such parts as may in their judgment require secrecy." So in meeting our obligations to provide for the common defense, to raise the standing army, to fight and declare wars, to raise the armies by both troops and money, we obviously are given the discretion to keep our proceedings secret.

Now, with that provision, in your judgment does the executive branch of the government have any constitutional right whatsoever to decline to furnish this Congress with information which is at least 3 years old?

Mr. GOLDBERG. It depends on what the information would be, I think. And I would want to know what it is. If it is still pending in negotiations on a critical disarmament, it might be that they might have that right.

Mr. MCCLOSKEY. This study is entitled "United States-Vietnam Relationships, 1945 to 1967." It does not relate to atomic weapon design, it does not relate to negotiations that are presently in progress, it refers to United States-Vietnam relationships, Mr. Justice. Now, if that is so, can you conceive of any constitutional basis upon which the executive branch could decline to furnish the Congress the information contained in that report?

Mr. GOLDBERG. I want to answer it my way, if I may, Congressman. My way of answering it is this: I think that Congress is entitled to have information essential for the performance of its duties. I think it has important functions, it is a coordinate branch of the Government, not subordinate. That has to be remembered.

I think that historical material, however embarrassing should be furnished—embarrassment is not a basis for denying to Congress what it needs. In this given situation, since I do not want to enter into the

court arguments, it would not be appropriate to discuss matters before the court. I wish to restrict my testimony to general principles.

I think the executive does have some right to preserve executive privileges, to carry on the conduct of Government. I have said it simply; it makes no sense when the material is all around the country not to give it to Congress. It does not make any sense.

Mr. REID. If the gentleman would yield——

Mr. Moss. Would the gentleman yield?

Mr. MCCLOSKEY. I yield.

Mr. REID. Could I make a brief comment? I think that the gentleman, the distinguished justice has just been heard downtown and perhaps this committee as well, because the President, as you may have gathered, has just directed that the 47 volumes be transmitted to the Speaker of the House and the President of the Senate.

Mr. GOLDBERG. That is a very good development.

Mr. MOORHEAD. Would the gentleman yield? I am told that it is being done with an understanding that they would be transmitted to the Armed Services Committee of the Senate and the Armed Services Committee of the House, which, if it is true, seems to me is interfering with the jurisdiction of the Speaker to determine to which committee a matter should be referred, and it clearly ignores the jurisdiction of the Senate Foreign Relations Committee, the House Foreign Affairs Committee and I submit the very proper jurisdiction of this subcommittee.

Mr. Moss. Would the gentleman yield? I would say that this is an illustration of news management in the highest form as an executive art, when the arrangement is made, a nice tidy arrangement, that we will send them to Congress if Congress sends them to the most friendly committees.

There also is the implication that this is military information. The bulk of it as published relates to foreign affairs, diplomatic information and it should, if confined to a committee, go to the Foreign Affairs Committees of the two bodies and certainly should be available to this committee.

I filed a suit this morning together with Congressman Reid. We do not regard this as a response to our demands and we will continue our suit.

Mr. REID. Would the gentleman yield on one question?

Mr. MCCLOSKEY. I will be glad to yield again.

Mr. REID. Would the gentleman not wonder whether it was proper for the Speaker of the House or the President of the Senate to accept the documents from the President under any conditions whatsoever?

Mr. Moss. If they accepted them under condition I regard the action as improper.

Mr. MCCLOSKEY. I would like to offer this comment in response to what Mr. Justice Goldberg has said. Our former colleague, then Congressman Richard Nixon, made the following comments on April 22, 1948, reported on page 4783 of the Congressional Record, and I would like to quote them verbatim because they apparently may jog his memory:

> Now, I am not criticizing the reporter for getting the information; that is his job. But I do say that when the time comes that the executive department feels that a particular letter is so confidential that it cannot be disclosed in executive

session to a committee of Congress, but that its contents can be bandied about among newspaper reporters, it is certainly high time that the Congress did something about that situation and got the information to which it was entitled.

That is Richard Nixon, April 22, 1948, a voice from the past.

Mr. CONYERS. Can you square those comments with the things going on today?

Mr. MCCLOSKEY. I suppose that if any one of us were to go to the executive branch we might change our views also. [Laughter.]

Mr. MOORHEAD. Mr. Conyers, do you seek recognition?

Mr. CONYERS. No.

Mr. MOORHEAD. Mr. Justice, would you be willing to answer questions in writing that the members of the subcommittee have?

Mr. GOLDBERG. By all means, I would be delighted.

Mr. MOORHEAD. I would hope because of the time problem that the subcommittee members will avail themselves of that opportunity. If anybody has a burning question now, we will hear it.

Mr. REID. I have something that is not quite a burning question, but, Mr. Justice, I would like to ask one fundamental point. It seems to me the power of access to the Congress in terms of inquiry and to documents is quite broad, and when Walpole fell from power in 1742 Lord Limerick said that:

> No duty of the House was more important than that of inquiring strictly and impartially into the conduct of those who were entrusted by the King with the executive power of our government.

The Continental Congress in creating the Department of Foreign Affairs in this country stated that:

> Any member of Congress shall have access to all papers of his office, provided that no copies shall be taken of matters of secret nature within the special leave of Congress.

I would like to ask you, should not the power of access be very broad in terms of the Congress?

Mr. GOLDBERG. Yes.

Mr. REID. And is that not our history and not narrowed by anything?

Mr. GOLDBERG. This is the purport of my statement. As I said, what I regret very much is this impasse which has developed and this collision. We cannot have that. There was someone who said that we must never demonstrate any impotence of democracy to deal with its problems. We live under a democratic system. And we must not force things. Sometimes it is unavoidable, but we ought to avoid forcing things to a collision course between the branches of our Government. I think that is essential.

We must do everything we can to avoid that. But obviously we have the Congress of the United States, a coordinate branch of the Government, entrusted with important powers, obviously they must have the information essential to the performance of congressional duties.

Also I answered a question, does an individual have a right to declassify? And I have been thinking, I said no, I should have added provided the classification system is legal. Now, I am not passing judgment on this, because that subject is being argued. Congressman Moss has had something to say about that. That is a legal question before the courts and the court will decide.

What I really meant to say is, if there was a proper classification system then we would all, as law-abiding citizens, have to abide by it.

Mr. Moss. Would you yield briefly?

Mr. McCloskey. I have concluded my questions, thank you.

Mr. Moss. I think implicit in our comments is the fact that even though the system, if we assume it is legal and that the guidelines are clear, their application to given information must also be consistent with the guidelines.

Mr. Goldberg. Oh, yes; and in law you know there is also a doctrine that any law has to be applied with an equal hand, and even government must observe the law. Government must observe it more importantly than anybody else, because it is the great teacher for good or for evil.

Mr. Moss. It is a doctrine which would well benefit the executive.

Mr. Moorhead. Thank you very much, Mr. Justice. You have been most helpful, most frank, and open to this committee. Your broad experience in government that you bring has been a great help to us. We appreciate it very, very much. Thank you.

Mr. Goldberg. It has been a great privilege to appear before you.

Mr. Moorhead. Profesor Bishop, I understand you would like to, if possible, get out of here by 2 o'clock.

Mr. Bishop. If it is possible. It is not essential.

Mr. Moorhead. It is now just before 12 o'clock. Would the subcommittee members be willing to proceed with Professor Bishop now and we will try to finish up with Professor Bishop. If we have to adjourn for lunch, Mr. White, can you come back?

Mr. White. Certainly.

Mr. Moorhead. Professor Bishop, you may proceed.

STATEMENT OF JOSEPH BISHOP, YALE UNIVERSITY LAW SCHOOL, NEW HAVEN, CONN.

Mr. Bishop. Mr. Chairman and members of the committee, I appreciate the opportunity to be here.

I do have a statement which is written in a fairly legible hand, because I didn't have time to get it typed. Being a professor, I would like to talk for just a couple of minutes about what I regard as the applicable constitutional law. The language of the Constitution, of course, tells us very little indeed about the President's power to withhold information from Congress or the public or for that matter from the courts.

The President's power, the Executive's power to punish unauthorized disclosures must, except in the most extreme circumstances in which martial law might be invoked, depend on statute. And the first amendment, of course, forbids Congress to make any law abridging the freedom of speech or of the press. But neither the Supreme Court nor anyone else has ever supposed these freedoms were absolute. Perhaps the best known formulation—I am sure you are all acquainted with it—is that of Justice Holmes in Schenck against United States decided in 1919. He said that "speech may be punished if the words used are used in such circumstance and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent," or in Holmes' still more famous

illustration, the Constitution does not protect a man from being prosecuted for shouting fire in a crowded theater and creating a panic.

Thirty years later the Supreme Court introduced a sort of concept of balancing one interest against the other. It said "in each case [the courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." That was in Dennis against the United States, decided in 1950.

Now, I do not doubt that the President could constitutionally prevent the disclosure, for example, of NATO's plans for the defense of Western Europe, or under an act of Congress, prosecute and punish the disclosure of those plans. I do not doubt either that documents which have no reasonable relation to that vague thing, the security of the United States, and which are classified only because they are politically embarrassing, cannot be kept secret, cannot constitutionally be withheld from the public or, a fortiori, from Congress. Of course, as always, it is the cases in between that make the trouble.

Now Justice Holmes in the Schenck case drew very little distinction between punishment after publication and prior restraint of publication. About 12 years after his opinion in the Schenck case, the Court held that the right to publish without prior censorship is even more jealously protected than the right to publish without being punished. That case is Near against Minnesota, decided in 1931.

For myself, I am inclined to think that the distinction between prior restraints and subsequent punishments for speech already made rests more on history than on logic.

It is true that the British gave up prior censorship long before they liberalized the sedition laws, the laws which punished imprudent speech.

Prior censorship ended in the fairly early years of the reign of William and Mary and it seems to have done so not as a matter of deliberate policy, not as a great step forward in free speech, but simply because the Parliament in the press of business at the close of a session simply did not get around to reviewing the licensing act. The Commons, though it did not object to censorship, wanted some changes in the administration of the act; the Lords disagreed, and before the disagreement was resolved, the session ended. They discovered that the press, freedom of the licensing act, did not go crazy, and it began to be generally realized that prior restraint, censorship was more trouble than it was worth.

Now I would suppose that if the Constitution permits the editors of the Times to be punished for publishing classified information, it would also permit that publication to be enjoined, to be prevented. Whether it permits either prevention or punishment seems to me to depend on whether the papers in question do, in fact, have any reasonable relation to that vague thing, and I can't come any closer to defining it than Justice Goldberg can, which is called national security. Or whether the only substantial effect of their publication would be the enlightenment of the public and the embarrassment of some politicians and bureaucrats.

In the last analysis, it seems to me that that question has to be decided by the courts. I can think of a perhaps analogous situation, which has actually of course arisen, in which the courts must decide whether or not the executive and/or Congress have abused their discretion in

deciding that a particular emergency calls for the suspension of normal civil liberties.

Examples of such cases that the Supreme Court has decided, with which I am sure you are familiar, are such cases as Sterling against Constantine, Duncan against Kahanamoku, and most recently United States against Robel.

I might say in passing, it seems to me unreasonable to expect judges to make that determination as to 47 volumes of documents in 36 or 48 hours. Now the right of Congress to get information from the executive presents different and perhaps even more difficult problems. The wording of the Constitution gives us practically no guidance. But as a matter of historical practice, every President from Washington on down has asserted a more or less absolute right to decide what information will be withheld from Congress, and, not surprisingly, they have been supported by the Attorneys General on several occasions.

Congress has repeatedly asserted its right to get whatever information it believes is necessary to the performance of its legislative function. The Supreme Court has yet to decide the issue and it won't do so if it can possibly avoid it.

I wrote an article on the subject nearly 15 years ago, back in Joe McCarthy's day, and it arose out of my experiences with that late Senator.

So far as I know, the most important development since then, since 1957, has been the Freedom of Information Act. And that statute, which does not apply to material which is classified in the interest of defense or foreign policy, does not, if that classification is justified, apply to most of the pieces of paper which are marked top secret or secret or confidential in the files of the Defense and State Departments.

Now there is small doubt in my mind or I guess in anybody else's that many of these documents, most of them, ought to be declassified. But the problem is, of course, how and by whom. And it is a very difficult problem.

It seems to me that under any imaginable statute or Executive order there will have to be room for the exercise of discretion. And that means room for the abuse of discretion. So the question becomes, who will police the use of that discretion? Congress itself directly probably does not have the time. We are talking about literally millions of pieces of paper. The courts will get the question, I think, very rarely and only when the pieces of paper have somehow or other gotten out.

The idea of an independent commission, which Justice Goldberg mentioned, has been of course much discussed. And it may be the solution. But it seems to me that even if such a commission existed, it would take an enormous amount of time to review even the small fraction of this mass of paper which the executive might wish to keep classified after the expiration of some period of years—or months—after the original classification.

Another thing that gives me trouble is that it is difficult for me to see as a practical matter how the President can be compelled to release documents which he says must be kept classified in the interests of national security, foreign policy of the United States, what-have-you.

As a practical matter the Justice Department is very unlikely to start a prosecution against the President for refusing to obey a statute which says he must release a paper which he has classified. I don't think it would be much more practical for Congress to send a marshal

to cleave through the secret service cordon and imprison the President for contempt of Congress. Theodore Roosevelt once contemplated that possibility, and Theodore was being about as pugnacious as even he could be. But, in fact, it didn't happen. There is certainly a burden on the President, on the executive branch, to cooperate with Congress and the public by instituting a procedure at least more effective than that which now exists for the routine declassification of documents. I know that is very easy to say, and it would be very hard for me to draft an administrative setup which would do it.

I want to mention only one additional possible justification for classification, for nondisclosure, which I think is entitled to some weight: The freedom of people in the executive branch to discuss controversial matters freely, to advise and recommend frankly, without fear of being pilloried for what they may say in these discussions. That consideration may not seem so weighty today in this context. Indeed, it doesn't. But around 1953, at the height of the McCarthy era, I can tell you it seemed very important indeed.

That is all of the prepared statement I have, sir.

Mr. MOORHEAD. Professor Bishop, I am afraid we will have to suspend for lunch, which means we can't make your 2 o'clock deadline.

Mr. BISHOP. That is quite all right, sir.

Mr. MOORHEAD. I would appreciate it if you could come back so we can direct some questions to you.

The subcommittee will stand in recess until 2 o'clock this afternoon.

(Whereupon, at 12:10 p.m., the hearing was recessed, to reconvene at 2 p.m., this same day.)

AFTERNOON SESSION

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will be in order.

This morning the announcement was made that the release of the 47 volumes of the Vietnam history will be delivered to the Congress. The announcement was made by Presidential Press Secretary, Mr. Ziegler. I think to have a complete record of the proceedings of this subcommittee, particularly the requests that the members and chairman have made for making these documents available to the Congress, that the Press Secretary's statement in full should be made a part of the record, and without objection it will be so ordered.

(Mr. Ziegler's statement follows:)

AVAILABILITY OF VIETNAM STUDY

STATEMENT BY PRESS SECRETARY RONALD L. ZIEGLER ON THE PRESIDENT'S DECISION TO MAKE THE STUDY AVAILABLE TO THE CONGRESS, JUNE 23, 1971

The President met this morning with Senator Mike Mansfield from 8 o'clock until 9 o'clock. They had breakfast together in the residence.

At the breakfast meeting with Senator Mansfield this morning, President Nixon volunteered to make available to the Senate and the House of Representatives the 47 volumes of the Kennedy-Johnson administrations' report on Vietnam, as well as a copy of the 1965 study of the Tonkin Gulf incident. The documents, which are classified top secret, have not been previously made available to either House of Congress.

As was announced yesterday, the President has directed the declassification review of these documents pursuant to his January 15, 1971, order instituting a review of classification of such documents.

President Nixon told Senator Mansfield that the unauthorized publication of portions of the documents created a situation in which Congress would necessarily be making judgments, in the meantime, on the basis of incomplete data which could give a distorted impression of the reports' contents. For that reason, the President feels that it is only fair to Congress and to persons mentioned in the documents that the full report be made available.

Since the documents relate primarily to the Johnson and Kennedy periods, President Nixon pointed out that he is not in a position to vouch for their accuracy or completeness. Despite the publication of some portions of the documents, they will retain their top secret classification pending completion of the declassification review, and will be made available to the Congress on the understanding that they will be subject to existing congressional rules and regulations covering the handling of classified material.

President Nixon this morning reiterated to Senator Mansfield that his primary and continuing concern has been to protect the secrecy of Government documents in cases where disclosure could harm the national security or impair negotiations with other nations.

President Nixon also emphasized that the decision to offer the documents to the Congress does not represent any change of policy, but merely reflects the special circumstances created by the recent unauthorized disclosures.

The documents will be delivered to the President of the Senate and the Speaker of the House for such disposition as the joint leadership of each body shall determine.

Mr. MOORHEAD. Our next witness——

Mr. Moss. Mr. Chairman, in connection with the minutes of a press conference with Mr. Ziegler, I would like to raise the question and ask that the staff be instructed to research and prepare a response at the earliest possible moment. Mr. Ziegler says, referring to the documents, that they—

Will be made available to the Congress on the understanding that they will be subject to existing congressional rules and regulations covering the handling of classified material.

I am not aware of any existing rules or regulations of the Congress covering the handling of classified material. Could the staff prepare a summary of such rules and regulations for inclusion in the record at this point, if they do in fact exist?

Mr. MOORHEAD. I think that is a worthy suggestion, and without objection it is so ordered.

(The summary referred to above follows:)

Pursuant to the request that the subcommitee staff examine any "existing rules or regulations of the Congress covering the handling of classified material," the staff made inquiry of the Parliamentarian of the House of Representatives and also examined the pertinent rules of the House dealing with committee files.

We find that there are no specific rules or regulations dealing with such sensitive materials that have been incorporated into the House rules. Rule XI, clause 27(c) deals with committee hearings, records, files, etc. It reads as follows:

"(c) All committee hearings, records, data, charts, and files shall be kept separate and distinct from the congressional office records of the Member serving as chairman of the committee; and such records shall be the property of the House and all Members of the House shall have access to such records. Each committee is authorized to have printed and bound testimony and other data presented at hearings held by the committee."

Nor does the Constitution spell out any such rules, although it does authorize Congress to restrict access to certain "secret" records, a right given to Congress alone and not the executive branch. The matter of "secrecy" is mentioned with respect to the House Journal in article I, section 5 as follows:

"Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy;"

This is not to say that some individual committees do not have informal practices to govern their handling of such material, such as requiring appropriate security clearances for staff, approved lock safes for classified documents, and other similar procedures patterned after executive branch regulations. However, these procedures are quite different than those referred to by Presidential Press Secretary Ziegler in his statement, apparently misconstruing just what constituted "rules or regulations" of the Congress in this connection.

Mr. Moss. The statement of the President's press secretary does not indicate any prior agreement to refer them to the Armed Services Committees of the House and Senate. I have been advised that that was a part of the understanding. I think the final assignment by the Senate and the House of these documents to a committee or committees of Congress would indicate the accuracy of that rumor.

Mr. Reid. Would the gentleman yield?

Mr. Moss. I would be happy to yield to the gentleman from New York.

Mr. Reid. I thank the gentleman.

I checked with the Parliamentarian on this matter and was apprised he was planning to rule that they should go to the Armed Services Committee, which I take it is now the fact. I think that one of the functions of this committee would be to make unmistakably plain that any classified documents, whether they are properly classified or not, should be completely available on an equal basis and open basis, to all Members of Congress; that there should be no distinction as between one Member and another. And I would ask the gentleman whether that would not be his understanding?

Mr. Moss. It would be my understanding.

I think in order that we be doubly reassured, I would like to move, Mr. Chairman, that the committee instruct the chairman to communicate a request to the Speaker for copies of the documents for study by this committee, which asserted original jurisdiction well ahead of the Committee on Armed Services. We are in the midst of hearings, and it is highly essential to the success of the hearings that the committee be supplied with copies for working purposes.

Mr. Moorhead. Well, I would hope that the gentleman would withhold that motion until the picture is a little clearer than it is now. I don't know whether staff accompanied by a Member would have access——

Mr. Moss. Members only.

Mr. Chairman, I would, with all due respect, and complete understanding of your desire to be very fair in this, insist upon my motion at this time.

Mr. McCloskey. I second the motion.

Mr. Moorhead. Would the gentleman withhold the motion until tomorrow when we will meet again?

Mr. Moss. Mr. Chairman, I prefer to request the question and insist on the motion at this time.

Mr. Reid. Mr. Chairman, I would second the motion.

Mr. Moorhead. This is the subcommittee's pleasure.

Mr. Erlenborn. Mr. Chairman, I just came in and was reading something and I didn't hear the motion. Could it be restated?

Mr. Moss. The Chair be instructed to contact the Speaker and inform him of the need of this subcommittee to have access to or copies of the documents in question and inform him of the fact that we as-

serted original jurisdiction, and were and are in the midst of hearings on this very question at this time.

Mr. MOORHEAD. In the opinion of this chairman, the Chair serves at the pleasure of the subcommittee. And if it is the subcommittee's wish, I will do what is in my power. I believe that the question should be deferred so that we can see what the ground rules are under this question that has just come up today, so that I personally will vote against the resolutions. But, of course, I will defer to the wishes of the majority of the subcommittee.

Mr. MCCLOSKEY. Mr. Chairman, for a question. Mr. Holifield, the chairman of the full committee, presumably would present this motion on our behalf, would he not?

Mr. Moss. No, Mr. Moorhead would be instructed by the committee to undertake the assignment.

Mr. MCCLOSKEY. Mr. Chairman, it would seem helpful to the processes of this committee if we could have the chairman of the Armed Services Committee, or whoever has custody of these documents, allow initial, immediate access to them, to study whether or not there is any need or testimony by those of us who want to put before this subcommittee questions related to the documents themselves.

I would not need to testify, for example, if I could have access to those documents.

Mr. MOORHEAD. I will say to the gentleman that it is my understanding from conversations with the White House that the understanding is that these documents will be available under the rules of the House, which gives access to every Member. I am sure that the gentleman from California will take advantage of that situation to be able to check his documents against the documents delivered to Congress. And we will cooperate, of course, with the gentleman in the timing of his testimony, and give him time tomorrow and later if this seems necessary.

Mr. CONYERS. May I be heard in discussion on the motion? It seems that we might be getting into a little bit of difficulty, as much as I agree with the objectives of this motion, by not meeting with our own full committee chairman and making direct contact with the chairman of Armed Services Committee, so that we might be all together. It may be more important that that be done this afternoon than perhaps any of the important testimony that remains, or maybe we can do both. But I think that even with such a motion coming from this subcommittee, it would not have nearly as much impact as this committee all agreeing that we should contact at least those two committee chairmen and get some disposition of this matter. I would include a third contact, the Speaker of the House, whose position I would be very interested to know about, and from there we would be able to move in the most positive fashion.

For those reasons, I must very reluctantly, if the motion is not withdrawn, vote against it.

Mr. ERLENBORN. Would the gentleman yield?

Mr. CONYERS. Yes.

Mr. ERLENBORN. I agree wholeheartedly with what the gentleman just expressed. I would think we would be better served to know what the ground rules were as to the receipt of these documents and their utilization by Members of Congress and the committees of Congress——

Mr. MOORHEAD. And the staffs accompanied by the Members.

Mr. ERLENBORN. Yes. Rather than to act precipitously this afternoon. I don't think that waiting until tomorrow morning, when the subcommittee resumes its sitting, is going to in any way be deleterious to the activities of the subcommittee.

Not wishing to foreclose further discussion or debate, I would merely say that I am prepared to move to table the motion until tomorrow morning. As I say, I don't want to foreclose further debate, so I will hold that motion.

Mr. MOORHEAD. I wonder if the gentleman from California would agree to withdraw the motion with the understanding that it would be the first order of business tomorrow?

Mr. Moss. The gentleman from California offered the motion from an abundance of experience in dealing with these matters.

Mr. MOORHEAD. I agree with that, and a great deal more experience than the present chairman.

Mr. Moss. We want to preserve our rights, particularly on the matter of jurisdiction of this committee, and the jurisdiction under the rules of the House, particularly the requirements of the Committee on Rules that two committees cannot undertake the same kind of inquiry, and we should now at this point take this matter directly to the Speaker.

I don't think it is necessary to confer with any other chairmen or any other committee of the House. The Speaker is receiving the documents, and the Speaker, if an agreement is made, is the man who will make the agreement. I think the matter should be taken promptly to the Speaker.

For that reason I offer and I insist on the motion.

Mr. CONYERS. Might I concur with my friend and ask that this be done without the benefit of a formal motion of the committee? I completely concur with everything he has said.

Mr. MOORHEAD. How about a motion that the gentleman from California and I and, let's say, the ranking minority member, call upon the Speaker this afternoon, expressing what is clearly the sentiment of the committee without a resolution?

Mr. Moss. I can call upon him, Mr. Chairman, but I prefer I be instructed to call upon him and the objective of my visit.

Mr. MCCLOSKEY. Would the gentleman yield for a question?

Mr. MOORHEAD. I don't know who has the floor now, so I will say you have the floor now.

Mr. MCCLOSKEY. I just have one question for the gentleman from California and that is about the chairman of our own committee. Don't you think that it would be better to transmit this communication and request through the chairman of our own committee? Your suggestion appears eminently appropriate, but I am wondering if, as a subcommittee, we shouldn't go through the full committee chairman?

Mr. Moss. If on a matter of this type we are required to go through the chairman of the full committee, for 16 years I violated that requirement.

Mr. MCCLOSKEY. Well, I appreciate that, but——

Mr. ERLENBORN. Would the gentleman yield?

Mr. MCCLOSKEY. Yes, I would. I am just in doubt.

Mr. ERLENBORN. I am recalling that this committee did adopt some new rules at the beginning of this Congress that affected, as I read them, the relationship between the chairman of the full committee and the subcommittees, so that your experience of the last 16 years may be somewhat tempered with a change in the rules.

Mr. Moss. It is quite possible. If there is a rule that would contravene the motion, I would like to be informed of that.

Mr. ERLENBORN. I pointed out to the full committee at the time we adopted those rules some of the changes that were being made. As I recall, the chairman of the full committee does have more, let's say, control, over the activities of the subcommittees than had been true in the past. Some of those provisions I objected to, but the majority did adopt them.

Mr. MOORHEAD. Let's restate the motion now. Could you read the motion?

(The reporter read the record as requested.)

Mr. ALEXANDER. Mr. Chairman, before you call for a vote, may I add to the debate I am persuaded by the caution of the chairman and by the observations of some of my colleagues on the other side of the aisle to proceed in a matter of this type with caution—and I certainly wish to do so but I plan to vote for the motion. I think to vote the motion down would possibly leave the erroneous impression with the leadership and maybe with the chairman of this committee, that this subcommittee does not wish to exercise the responsibility with which it is charged. Observers might incorrectly assume we are willing to abandon those responsibilities in favor of another committee.

Mr. CONYERS. Mr. Chairman, I wish to formally change my position, because I quite agree with my friend that a negative disposition of this motion would raise some very serious questions about what the will of the members of the subcommittee are. And since it is a motion directing you to go to the Speaker—and I suppose we don't have to add amendatory language with reference to the chairman of our committee or the chairman of Armed Services—I am sure you will make those stops along the way.

Mr. MOORHEAD. The chairman of our committee?

Mr. CONYERS. Yes. I think that Mr. McCloskey's observations are well founded, regardless of what the rules are. I think we all know that if we do not enjoy his full support behind the subcommittee, we are going to run into all kinds of problems anyway. So I am going to support the motion for the reasons stated.

Mr. MOORHEAD. I thank the gentleman. As I said, I expect to abide by the will of the majority and actually cast my vote with the majority. If there is no objection, I would like to have the chairman of the full committee advised as soon as possible of our vote and our intention to proceed.

Mr. REID. I think that would be the understanding, Mr. Chairman.

Mr. HORTON. Mr. Chairman, I don't think that we could act on anything like this without bringing it to the attention of the full committee. I think it is an improper procedure for us to go directly to the Speaker. We are a subcommittee of Government Operations and I think if we take any action that properly belongs before the full committee, the full committee must act on it. I certainly think that is a better procedure to follow.

Mr. Moss. The motion instructs the chairman of the subcommittee to act. It does not instruct, nor would it presume to instruct the chairman of the full committee. Certainly that would require the vote of the full committee.

There is nothing in the rules that says that a subcommittee can't act on matters assigned to it for action. That is all in the world that is being proposed here.

Mr. McCloskey. Would you yield for a question?

Mr. Moss. Yes, indeed.

Mr. McCloskey. It seems to me the decision in the near future will be whether this subcommittee votes to declassify these documents on our own. This is the constitutional confrontation, as to whether the executive branch has sole control over declassification or whether this House, in possession of information available to it, chooses in its judgment to exercise its constitutional prerogative to say these matters shall be kept in secrecy. Because of this, it seems to me that we should make every effort at this stage to obtain the acquiesence, the assistance, and cooperation of the chairman and the entire full committee. Because the ultimate responsibility may be upon us in a few days to recommend that these documents available to us should be declassified by the full committee. In view of this potential situation, it would seem to me the better part of discretion to go through the full committee chairman.

That is my thought. But I offer that without strong conviction.

Mr. Reid. If the gentleman will yield, there are two points you are not touching on.

One is the question of establishing the jurisdiction of this subcommittee, which as Chairman Moss has pointed out has been clear for a long time. And that question should not be muddied. I think the gentleman would have some interest in looking at those documents and if they stay in the Armed Services Committee or if you don't establish access, it is a matter of some interest to the gentleman, I think.

Mr. McCloskey. I agree completely with the thrust of this motion. My only question goes to the procedural aspects of acting through the chairman of the full committee, the point made by the gentleman from New York.

Mr. Conyers. Might I speak to that?

Mr. Moorhead. You have already suggested that the chairman of the full committee be contacted.

Mr. Conyers. Yes, I think I have. I think that everyone here who is apparently going to support the motion is going to check, meet, communicate with the chairman of this full committee. There is nothing in the rules that requires us to do otherwise. We are all very sensitive to the fact that we want the support of our entire committee since this matter will sooner or later come before them for review.

Mr. Erlenborn. Would the gentleman yield?

Mr. Conyers. Yes.

Mr. Erlenborn. I would take it from the terms of the motion as put by the gentleman from California that any such consultation with the committee chairman is after the fact, because we would have already instructed our subcommittee chairman what to do, regardless of what the full committee chairman might feel is the proper procedure. So, though you say this would be done in consultation with the committee chairman, I think you are presenting him with a fait accompli.

where we say this is what we already determined we are going to do, now we are going to consult with you.

Mr. CONYERS. What would the gentleman's alternative be?

Mr. ERLENBORN. I said I would move to table consideration of this motion until tomorrow morning and at that time I would be prepared to support the motion. I would be inclined to support it now, but I feel the consultation should take place before we instruct our subcommittee chairman, not after.

Mr. MOORHEAD. I believe that the subcommittee is in the position of voting.

Mr. ERLENBORN. Then, Mr. Chairman, I will at this time ——

Mr. MOORHEAD. I will say if the motion to table is defeated, I would ask the staff of the full committee who are present to notify the chairman of the full committee immediately of this action, so that I can coordinate my efforts with him. Sensing, I believe, the feeling of the committee, I now intend to go with the majority of the committee and vote against the motion to table—if the gentleman wants to present that motion.

Mr. HORTON. Mr. Chairman, can I be heard?

Mr. MOSS. Point of order, Mr. Chairman. You cannot be heard on the motion to table.

Mr. ERLENBORN. I have not made the motion as yet. I have announced my intention to make the motion. I have withheld making the motion so we could have the freest discussion. I think the freedom of information subcommittee should have the most free discussion.

Mr. MOORHEAD. I do believe the subcommittee has reached a consensus and are probably ready to vote. But the gentleman from New York may comment.

Mr. HORTON. It seems to me there is not any question about the jurisdiction of this committee over the question of Government information. That is outlined in the jurisdiction of this committee and of this subcommittee. It was established I think in the organizational meeting of the full committee at the beginning of this Congress.

I do not think that this subcommittee ought to go directly to the Speaker without going through the full committee. I think that any action that we take ought to be the action of the full committee. I do not think we should report anything and instruct the subcommittee chairman to do anything, regardless of whether he makes a commitment to speak to the chairman. Because by the reading of that resolution, you have, if it is passed, direct instructions to go to the Speaker on this matter.

I think that it has much more effect and force if it goes to the full committee and the full committee debates it and then takes action on it. So I feel——

Mr. MOSS. Would the gentleman yield?

Mr. HORTON. Yes.

Mr. MOSS. The full committee meets on the third Wednesday of each month——

Mr. HORTON. The gentleman well knows that we can have a special meeting and the chairman could call a meeting.

Mr. MOSS. It requires a week's notice for a special meeting and our rights would be fully protected by the delay?

Mr. HORTON. I think there is no question but it can be called. The rules do permit special meetings to be called; you can waive that notice.

The chairman certainly is aware of that. I think you have much more standing on this if it is done through the full committee. I think it is a mistake to act this way. And if there is a motion to table, I will vote for it on that basis.

Mr. MOORHEAD. I believe that even without any resolution of this committee, I could go directly to the Speaker and talk to him. So I think we are making an awful lot out of this. I could go without a resolution; sure I go stronger with a resolution. I certainly would not go without a resolution before talking to the chairman of the full committee. I would not go even with a resolution without talking to the chairman of the full committee.

Mr. CONYERS. Point of information. If this motion does not succeed, will you go to the chairman of the full committee and the Speaker of the House?

Mr. MOORHEAD. Whichever way the motion goes——

Mr. CONYERS. Without a motion?

Mr. MOORHEAD. I think there is enough sentiment that I should go, whichever way the motion goes. But I believe there is a sentiment on the subcommittee that I go armed with a resolution of the subcommittee and I am perfectly willing to accept that. So I would suggest——

Mr. MCCLOSKEY. Mr. Chairman, I hesitate to delay this any longer, since we have witnesses waiting to testify. I wonder if our discussion—and I think I would vote for the motion to table right now on the state of the facts in the record—would be more profitable if we suspend the discussion temporarily, and hear the remaining witnesses. During that testimony, perhaps someone could contact the chairman of the full committee and obtain his views.

I am disturbed, frankly, about the protocol of the subcommittee usurping the prerogatives of the full committee. If I knew this was going to be deferred until the full meeting on the third Wednesday in July, I would vote against the motion to table.

Mr. REID. I might say that is a rather eloquent defense of the seniority system. I think the rights of this committee are clear. I do not feel that this committee has to be circumscribed—I think Chairman Moss has had more experience than anyone in this House on protecting basic rights of this committee and freedom of information and access thereto. I think when he says that our rights should be reestablished, clarified at this time, I think his experience backs it up.

Mr. MCCLOSKEY. But let me respond. If the chairman of the full committee happened to say, for example, in the next 10 minutes that he did not agree with our motion, then I would vote for Mr. Moss' motion forthwith. But I am disturbed about, at least not giving him the courtesy of an inquiry at least about this procedure before we vote. If the chairman feels we are doing something improper, and he wants to wait until the third Wednesday in July, to hell with it. But I would like to know the facts before I vote.

Mr. MOORHEAD. The Chair is prepared to put the question unless the gentleman from California is persuaded to defer.

Mr. ERLENBORN. Mr. Chairman, I now do make the motion to table the motion until our meeting tomorrow.

Mr. MOORHEAD. All right.

The question.

Are you ready for the question?

As many as are in favor of tabling the motion signify by saying "aye."

(Chorus of "ayes.')

Mr. MOORHEAD. Those opposed, "no."

(Chorus of "noes.")

Mr. MOORHEAD. In the opinion of the Chair, the "noes" have it——

Mr. ERLENBORN. May we have a roll call, Mr. Chairman?

Mr. MOORHEAD. Mr. Phillips, will you call the roll?

Mr. PHILLIPS. Mr. Moorhead.

Mr. MOORHEAD. No.

Mr. PHILLIPS. Mr. Moss.

Mr. Moss. No.

Mr. PHILLIPS. Mr. Conyers.

Mr. CONYERS. Aye.

Mr. PHILLIPS. Mr. Alexander.

Mr. ALEXANDER. No.

Mr. PHILLIPS. Mr. Reid.

Mr. REID. No.

Mr. PHILLIPS. Mr. Horton.

Mr. HORTON. Aye.

Mr. PHILLIPS. Mr. Erlenborn.

Mr. ERLENBORN. Aye.

Mr. PHILLIPS. Mr. McCloskey.

Mr. MCCLOSKEY. Aye.

Mrs. DWYER. As ranking minority member I am entitled to a vote on the subcommittees.

Mr. PHILLIPS. Mrs. Dwyer.

Mrs. DWYER. I vote to table.

Mr. PHILLIPS. The ayes are five; the noes are four.

Mr. MOORHEAD. The motion to table is passed.

I hope we can consider it overnight and see if a compromise can be reached by tomorrow morning when the committee meets again.

Now the subcommittee will be in order for the regular business of the subcommittee.

Mr. White, we apologize for this delay. We look forward very much to your testimony. You have had broad experience in the congressonal field; you have been an assistant to Senator Kennedy in the Congress; an assistant to Senator John Sherman Cooper. You have had the unique experience of serving as assistant special counsel to President Kennedy and being assigned the job of coordinating the White House classification and declassification program.

You also were special counsel to President Johnson and served as Chairman of the Federal Power Commission. I think you bring to this subcommittee a great wealth of experience.

Following your testimony I propose that the subcommittee be open to ask questions of either you or Professor Bishop and we can thus have an exchange of ideas between the two of you and the members of this subcommittee.

You may proceed, Mr. White.

STATEMENT OF HON. LEE WHITE, FORMER CHAIRMAN, FEDERAL POWER COMMISSION

Mr. WHITE. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee: May I say that the time spent in waiting has been most instructive to me. I was pondering whether the Federal Power Commission should reach its decisions in public, just as you have at this very moment, and——

Mr. MOORHEAD. Have you made a conclusion on that point, Mr. White? I don't know what I would conclude.

Mr. WHITE. It is the wrong room and the wrong atmosphere to say it, but I think I will stick with the secret bit for awhile. But maybe not.

I must say this has truly been instructive to sit here and observe. I appreciate the opportunity to come here to talk to the subcommittee. And, of course, as you have suggested, some of my background has fit into the work of this subcommittee in the past and I remember that on some occasions our relationships may not have been quite as cordial and pleasant as they have been so far today.

We are at a time, of course, because of the very great public interest in the Pentagon study on the origin of the U.S. involvement in Vietnam, that makes this particular topic and this particular hearing a matter of great national interest.

Most of the time discussions of this sort would not elicit the type of attention and public notice that this has. So I am delighted and pleased that the subcommittee is taking this occasion to put into discussion and dialog some of these very difficult issues.

I hope that your whole series of hearings will be as useful and as informative as was Justice Goldberg's discussion and Professor Bishop's discussion this morning.

At the outset of my remarks, I would like to take note of a few basic principles that I think are applicable in this very particular area.

First, I would observe that this tension that exists between the legislative and the executive branches of Government is a very natural phenomenon. Constitutional division of responsibilities and authority inevitably leads to rivalries and frictions between the branches of Government, and particularly do I believe this is so on a day-to-day basis between the Congress and the executive branch of the Government. And this is true regardless of whether both branches are controlled by the same political party—although there is obviously a sharper relationship under divided party control.

When President Kennedy went into office we assumed then there would be a much easier relationship because both the executive branch and the legislative branch were under Democratic Party control. It did not prove to be quite that harmonious.

Despite the stated and sincerely held view of all incoming Presidents that it is their firm intention to run an open administration with maximum access to information by the news media, it does not take long before there is a clash, and the administration understandably tries to manage the news. Managing the news in my view is not quite so horrendous if you define the terms right.

I think what you are talking about really is emphasis. One simply cannot imagine an administration that does not try to emphasize its accomplishments and suppress or minimize its failures or blunders. After all, we don't elect to the office of the Presidency a man who wants it to appear that his party, his administration, his Cabinet, his departments and agencies are doing a bad job.

It is equally difficult to imagine a press that does not try to ferret out mistakes, scandals, abuses, deficiencies, and incompetencies. Increased circulation, Pulitzer prizes, and other rewards in the journalistic universe do not come from publishing Government handouts—nor is that truly the role of the press.

Here, too, just as in the strain and tension that exists between the legislative and executive branches, the sweep of history is clear that our Nation is better served by a free, uncensored press despite the headaches created for the Government by such an institution and despite some overreaching by the press on rare occasions.

Commentators on the doctrine of executive privilege——that principle which holds that the President cannot be required by judicial process to perform any given act and cannot, therefore, be required to make information available to the Congress which he does not wish to divulge—are fond of pointing out that President Washington first enunciated the doctrine and made it stick, but far more important is whether the President can invoke the privilege and convince the general public that his grounds for doing so are legitimate, reasonable, and convincing.

May I say I think that is perhaps the most important sentence in my entire statement. One of the first problems awaiting President Kennedy was a dispute with one of the two subcommittees that merged to create this subcommittee. The chairman of the Foreign Operations Subcommittee, former Congressman Porter Hardy, had been engaged in a great struggle with the Eisenhower administration over some evaluation reports of the Economic Cooperation Agency, the predecessor of the AID Agency.

I can't quite recall the nature of the conflict, but it involved differing interpretations by the Attorney General, the Comptroller General, and I believe there was an effort made to pass a rider on the appropriations bill which would prohibit the payment of the salary of an individual who had not produced information, even though he had been instructed by the President and the Secretary of his Department not to do so.

In any event it was a big rhubarb that was going on right at the end of the Eisenhower administration. Chairman Hardy suspended his battle only long enough to let President Kennedy be inaugurated—in fact, if I recall correctly, Chairman Hardy mentioned this to President Kennedy at a gala the night before the inauguration, so it had not slipped from his mind, he was pursuing it rather diligently.

This very quickly precipitated a study of the whole problem. President Kennedy, fresh from the Congress, concluded that all reasonable doubts should be resolved in favor of the requested information to the appropriate committees of Congress. This rested on the premise that refusal to make information available did two things, neither of which was very appealing: It attracted much more attention to the substantive issue and frequently blew it into proportions which it

would never otherwise attain; and second, it created a public relations battle that the Executive could hardly ever win since the presumption that the administration was trying to conceal wrongdoing was very nearly irresistible.

Let me say that I believe for example that if the 47 volumes you gentlemen were discussing a few moments ago were sent to each Member of Congress one Saturday afternoon, and released at the White House, it would have been a 2-day story and that would have been the end of it.

It does not now look like it will be over in 2 days. If I recall correctly, a great deal of the material requested by Chairman Hardy was made available, with certain items withheld or paraphrased to protect legitimate confidences and prevent unnecessary antagonism of a foreign government. This was the resolution of the dispute or the contest with the Foreign Operations Subcommittee. I should note that the decision by the White House and by the President was taken over the vigorous objection of some agency personnel who offered to the newcomers to the White House the advice that once you begin to make information available, you can no longer withhold that same category in the future.

Or, put in different terms, if you don't exercise the executive privilege, it may be lost. In the Kennedy administration's newness, and reflecting the President's having come immediately from the Congress, the decision was made to make as much information available as possible, a decision which I believe to have been sound, if not inevitable.

One technique we developed in responding to congressional requests for information regarded as inappropriate for public disclosure, was to offer the subcommittee or committee chairman an opportunity to see the material on a privileged basis with an oral explanation justifying the withholding of the documents from the committee. The purpose was to demonstrate to at least one individual in the congressional organization that the purpose of the withholding was not to cover up mistakes or to prevent embarrassment to individuals or the administration, but rather to avoid some legitimate abuses or detriments, either personal or governmental.

My recollection is that rarely did the chairman take advantage of the offer, but the simple act of having made the offer indicated good faith.

Through the tenacious efforts of this subcommittee, and particularly its then chairman, Congressman Moss, President Kennedy agreed formally and in writing that the executive privilege would be invoked only by the President personally. President Johnson stated his adherence to the same principle in an equally formal fashion, and I understand President Nixon has given the same assurances.

May we note that even though, Congressman Moss, we may have gone along very reluctantly and being pushed and shoved very vigorously, now that we are there, I think it was a good thing the subcommittee did, and I think it had a salutary effect and I don't believe the Nation or the administration was shaken to its roots by having had that pronouncement by the President.

Of course, by the same token, I remember the struggles the administration had with this subcommittee over the freedom of information legislation. I believe and hope that the struggles produced a better bill

than might have been the case than in the manner in which it was originally cast.

Much more important is the fact that it is now in being, is law, and I think it is extremely constructive. From the point of view of the operation of the White House staff, this policy has a beneficial impact. When a department or agency is considering whether to withhold information, it must recognize that it has to make a case to the President or to the staff officer charged with the responsibility for screening requests to use executive privilege. I do not have any statistics, but I would certainly expect there have been far fewer instances in which executive privilege was invoked following adoption of the requirement that the President exercise it personally than was the case previously.

I recall a number of people during the time I was in the White House with this responsibility who would call on the telephone and say a committee or subcommittee has requested information and they think it ought to be withheld. And simply having to explain it to somebody in the White House, and recognizing there was nobody on the White House staff who could say okay, he has to go to the President, it screened out a lot of potential problems.

I am sure you believe a lot of them got here, but let me assure you there were a whole host of them that did not reach you by virtue of that simple change by the President that he alone could exercise the privilege.

I think we probably saw today in the President's decision to send the Pentagon documents to the Congress that if the issue gets important enough, the President takes a hand in it. I can't believe that decision was made by somebody down the line. That was obviously a Presidential decision.

A related point has to do with the accountability for executive branch decisions. This was mentioned earlier this morning and I think it is somewhat important and perhaps even appropriate to the discussion. The Congress, I know, senses great frustration in not being able to have before it at all times those people who are not only formally the decisionmakers, but those who are actually participating in it.

With the distinct trend of greater coordination and decisionmaking in the White House staff and the related agencies, such as the Office of Management and Budget, there is a growing frustration on the part of congressional committees. It simply does not seem proper for the President's principal national security advisor, for example, to hold press briefings, but not be available for congressional hearings.

This is a difficult area, of course, because it gets into that tricky problem of protecting the President. And I believe there is a general concession that he should have some protection. And yet there is a great tendency on the part of the Executive to want to have it both ways. You may recall that the President's science adviser was given an additional statutory assignment as head of the Office of Science and Technology, in large measure so that he could testify before the appropriate congressional committees and not violate the principle that personal staff of the President should not be called to congressional committees to account for actions that are taken or those that were not taken.

The executive branch must, of course, be permitted to engage in decisionmaking on a basis that insures that the comments, recommendations, and contribution of all who participate in the process will be candid and forthright. I believe that this is recognized and conceded by all. Living as we do, however, in the age of the Xerox machine, just about anyone who reduces any thoughts to writing today recognizes the inherent danger that it will be reproduced. I take it that this is a fact of life that we are prepared to adapt to and accept.

And besides I don't know what the alternative is. Unfortunately there is a tendency on the part of the Executive, and I think probably this is universal, to engage in gamesmanship in this whole field of making information available. Included in this category are "the stall," "the deluge of material," the selection of the day after Thanksgiving for release of documents, the please-be-more-specific dodge, and a host of others that innovative participants in the game can devise. There should be a conscious and conscientious effort to avoid this temptation, for the issues involved and the principles involved are really quite serious.

I don't know the solution truly, but I can tell you as a participant in the game that I have done it, and there are times when your mind begins to think more in terms of winning a point than in the substance of what you are involved with.

How that can be turned about and wound down, I am not sure. But if your hearings lead toward the end, they will have done something extraordinarily useful and constructive. In a general sense there must be some balance in these relationships. For the most part, orthodox procedures and rules operate satisfactorily, but when the sticky ones come along—and they do quite regularly—the administration must, it seems to me, jealously guard its public acceptability and credibility.

Probably the most distressing aspect of today's situation is the indications by polls that a substantial majority of the people of this country do not have the necessary degree of trust in their government. Whether government has and is informing the public accurately and as completely as is possible is certainly important—but equally important is whether the American public believes that it is. This is a serious problem that warrants the attention of the executive and legislative branches of government.

My remarks have indicated the fuzziness and difficulty in this area of conflict involving first amendment rights, the rights and the obligations of the executive branch and the legislative branch to discharge their constitutional responsibilities, the right of the public to be informed about the decisions of their government and the need to protect sensitive military and diplomatic information. I do not believe that any additional statutory formulation is required in this connection—I am talking now about executive privilege—and perhaps as unsatisfactory as it may seem at times, the Nation's best interests will be served by continuing these natural tensions—or checks and balances—woven into our constitutional framework.

There are, however, a few specific suggestions that may be helpful in keeping congressional pressure on the administration. As one who, as I suggested, was subject to that pressure, I believe it is extremely important and you may not believe it, but it is extremely effective, I think, also.

First, on matters of great national concern—now we are talking about the Pentagon study—a concurrent resolution by the Congress requesting or demanding that appropriate documents be made available would, if supported by substantial majorities, make it nearly impossible, for the administration to refuse to make the documents available.

I think this morning we saw that the President has concluded that he just couldn't, in the face of public opinion and almost the absurdity of the situation described here, continue to withhold those documents from Congress.

Second, the practice of individual members of Congress, separately or jointly, using the Federal courts to implement the Freedom of Information Act can attract great public attention and would have a salutary effect on executive branch officials who would otherwise be reluctant to make information available.

When I wrote this yesterday I didn't realize that a couple of the members of the subcommittee had already scooped me and had done that. I believe it is extraordinarily useful. I don't know whether you will win or not in the courts, but I think you have already done something by simply having filed the action. Let me say as one who served on a regulatory body that was notoriously slow, when lawyers filed an action in court saying, "I know those fellows have the right to make a decision, but they don't have the right not to make the decision and we are going to insist they do it," we paid attention.

It is a wonderful way to attract somebody's attention.

Third, Congress can, by its example, promote the trend toward openness by continuing its movement toward a more open process in reaching policy decisions.

We have just had another beautiful example in your action on the motion that was before the subcommittee a few moments ago.

Four. The so-called resolution of inquiry procedure mentioned in recent news accounts, the details of which are not familiar to me, but which appear to be appropriate and tailormade for breaking information loose from the executive branch.

Five. The Congressional leadership, in concert with the President, could provide a degree of reassurance to the country if the President were to reaffirm that only he is empowered to invoke executive privilege and that a reasonable, agreed upon procedure has been established for complaints by Congress to be received by a designated White House staff officer. In this connection I note that I was once so designated and, so help me, not one single complaint came to my attention in the time I had that assignment, perhaps 3 years.

So it may well be that Congress is aware of the designation of an individual to receive complaints, but the press may not be aware of it, and the public may not be aware of it, but if we could take advantage of it in the difficult situation which has developed to let it be known that there are such processes they could be helpful.

I was fearful I might have drafted Executive Order 10501 when I heard it being knocked apart this morning and I looked at it and realized it was well before my time. But I suggest that those who criticize it, if they would read it would find it not so bad.

The big problem is implementation. I think the way you get it implemented is by what you are doing, pushing and exerting that pressure on the executive branch.

As one who sat close enough to watch some of these dynamics in operation, I believe that continuing pressure on the executive branch by Congress and the press is desirable and essential.

The question of security classification of materials, a troublesome area in its own right—and that has had a great deal of your attention today, of course—frequently compounds the executive privilege package of issues. Although my own experience in this field is quite limited, I share the general reaction that seems to be prevalent today that a lot of material has been classified without proper foundation and that there should be improved procedures for declassification.

When one sums up the various forces operating in a field where precise formulations are really of very little help, the final answer has to be reasonableness. If the President can persuade the public and the Congress that his actions in withholding information is justified, then he will have won that round. In my view, he is far more likely to prevail if his administration has established a reputation for making the fullest possible public disclosure of information and, quite obviously, he will have aided himself and his party politically if he has been successful in this regard.

That concludes my formal statement, Mr. Chairman.

I am, of course, glad to answer any questions that I may be able to answer.

Mr. Moorhead. Thank you, Mr. White, for your very helpful statement. The fact that you were the designated official for executive privilege makes your appearance here much more valuable to this subcommittee.

Mr. White, on page 6 of your testimony you, it seems to me, suggest that maybe the solution is sort of a game between the Executive and the Congress, the stall, the deluge of material, the day after Thanksgiving, the please-be-more-specific kind of approach. Wouldn't you think that a statutory solution with proper machinery, expertise for carrying out congressional rights to obtain information, would be a better solution than the game plan?

Mr. White. Candidly, no, Mr. Chairman. I just do not think in this area that the mind of man can come up with the rules that will make any sense. The rules are quite good and clear. It is just if somehow or another there can be developed a greater trust. It is extraordinarily difficult, but, as I suggest, the type of pressure that this hearing itself represents will be more beneficial in my view to getting actions that you and the rest of the Congress and the people in this country will believe is satisfactory, far more effective.

It may well be that I am simply pessimistic about the prospects of legislating. I think, for example, that the freedom of information statute is a good one, and I do not know exactly what legislation people have in mind to get into this area of what the President should make available. I truly believe the President should not be hamstrung. I think he ought to have considerable freedom and I think that if he will make sure that whenever anybody says you cannot have information when you have requested it, if he has done so personally, you will see you will get most of the information you want—you get to the sticky ones, the ones that have something to do with great public issues, there will be an outcry, and there will be political pressures that he cannot resist and you will have the material.

But as far as legislating it, it is almost like, to go back to my old field legislating against blackouts. You could get the Congress unanimously to adopt legislation saying there should be no blackouts, but they will happen regardless of legislation. I think here you would have a difficult time legislating conduct and behavior by individuals, because the rules I think are satisfactory as they are.

Mr. Moorhead. The Freedom of Information Act does exempt national defense classified information under Executive orders. What I am suggesting for comment would be that the Congress establish a board of expert classifiers to meet with the Executive classifiers and debate which item of information should be classified and which should not. Something to offset the exclusive power of the Executive to determine this without representatives of the people having experts who can say really we believe this is not——

Mr. White. I am sorry. I did not track you properly when you first asked the question. I thought you were talking about the executive privilege end. I do not have that same feeling that there should be no legislation on the classification end of it. I do not want to quite disqualify myself as not having had any experience, but my experience is limited.

As I said, while I was at the White House nobody from the Congress or anywhere else came and said, here is a document that is overclassified or underclassified or classified right or said anything. The problem, I think, may indeed be in the lack of a specific guide, although once again if you will read the language of the Executive order, it is not bad. I do not know exactly how you could improve on it, except maybe if you felt better if the Congress adopted it rather than have it an Executive order.

If you read through it I think you get the impression that it was drafted by reasonable men who have the same views you do. And yet, as Justice Goldberg and others have said, there has to be mountains of that stuff that is way overclassified. And if it is overclassified today, you can imagine what it is like tomorrow, because most of that material has a very short half-life.

Mr. Moorhead. Mr. White, you have suggested, and I think very eloquently, that when the Congress knows of the existence of a document we do have ways of bringing pressure to bear. But so often the case is that we do not even know that this kind of discussion or this kind of document actually exists. We sometimes learn about it because of the diligence of the press, they unearth it, and then we go after it, such as the 47 volumes of the Vietnam history.

Is there any legitimate, proper way that you know, such as my suggested board of classifiers, that we could somehow learn of the existence of the documents and then make a judgment?

Mr. White. Well, that is an intriguing thought. It seems to me that at a minimum if you wanted to reduce the number of documents that went into the top secret category, for example, you could simply insist there be submitted periodically a list of all such documents that have been classified or declassified.

I have a hunch that once again you are going to have the problem of the deluge. You will have so much material, until they start using those classifications reasonably, that it will be tough. Most of the time we assumed in the executive branch when a subcommittee chairman or

staff member was after some material he already had a copy of it. It never occurred to us that we were withholding something he did not have. He really wanted to get it on the record, not always, but frequently.

Again this is the curse or the problem of living in the Xerox age. But there are, I think, some of these legitimate protections that ought to be preserved and yet I believe that on the classified material end there are some improvements that could be developed and the one we just discussed, of at least requiring a listing of the documents, even if you do not have the documents, that would be helpful.

Mr. MOORHEAD. Professor Bishop, if I understood your testimony, you said that if a statute permits punishment for the publication of a document, it inherently means that there could be an injunction preventing the publication of that document. I do not know if I understood it correctly or not.

Mr. BISHOP. That is substantially correct, Mr. Chairman. I know the Supreme Court has suggested, particularly in *Near* v. *Minnesota*, that there is an even greater presumption against prior restraint than there is against subsequent punishment of speech. But it does seem to me, the more I think about it, that the distinction between the two is more historical than logical. In other words, I think you ought to have just as much right not to be put in jail for publishing as you have not to be enjoined from publishing it in the first place.

Mr. MOORHEAD. I do not think I share your view, but let me pass on to the next question.

You raise the question of declassification, by whom and how it should be declassified. Do you think there should be a proper congressional input into that declassification process?

Mr. BISHOP. Yes, I think there could be and should be. Certainly nobody disputes that Congress has as big an interest as the public in having access to all of this information. And I should think that Congress certainly could contribute something to the development of a rational system.

Mr. MOORHEAD. Thank you, Professor Bishop.

Congressman Reid?

Mr. REID. Mr. White and Professor Bishop, I am most grateful for your thoughtful and pertinent and incisive testimony.

Mr. White, might I direct you to your testimony, page 2, to pursue the thought there a little bit. At the bottom of the page you say, "Commentators on the doctrine of executive privilege—that principle which holds that the President cannot be required by judicial process to perform any given act and cannot, therefore, be required to make information available to the Congress which he does not wish to divulge." et cetera. "President Washington first enunciated the doctrine," and so on. First of all, I am rather troubled by the concept that there is some information which, assuming we are talking about fundamental and serious and major information as distinct from tactical or matters that properly would be confidential between heads of Government, but on fundamental questions are you suggesting here the President has the right to deny fundamental and basic information to the Congress?

Mr. WHITE. It is a tough one, Congressman. I think, however, he probably does have the constitutional right to—well, it is not a constitutional right—but the practical means to withhold information. It

works this way: he cannot—there is no practical way that, under the existing framework in which we operate—where he individually could be compelled to provide documents. You do not have an army.

Mr. REID. Well, I am not certain that there has ever been a case where the question of compelling through subpena the presence of an executive officer has been fully tested by the Congress.

Mr. WHITE. I think that is what Professor Bishop said this morning, that the Supreme Court is going to avoid that case if it possibly can. He may be right, I may have overstated it in the sense that a court could not at some time get the case of *Congressman Reid* v. *President* in which he absolutely tries to have that President subject to judicial process.

Mr. REID. What I guess I am trying to define with you is that there are certain qualified rights, and perhaps some would say that there are no absolute rights between the coordinate branches of the Government. But surely I do not think it can be argued in this day and age that the White House has the right to conceal or deceive or to deny fundamental and basic information from the Congress. At least, I do not believe you would attempt to do that.

Mr. WHITE. No.

Mr. REID. As I read some of the history here, I do not know if you are familiar with the act of September 2, 1789, but it was drafted by Alexander Hamilton, was passed in the First Congress. It stated:

> It shall be the duty of the Secretary of Treasury to make a report and give information to either branch of the legislature in person or in writing as he may be required respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office.

Chief Justice Taft subsequently said about that, "Its conditional decisions have always been regarded as they should regard with the greatest weight in the interpretation of that fundamental instrument."

What I am trying to suggest is the right of the Congress historically to information central to its purpose seems to be quite broad and clear. It seems in recent years it has become relatively narrow and far from clear. I think there should be a serious effort made to redress the balance.

I think you are saying the President in some cases may not be disposed to or cannot be compelled to provide certain information. On the other hand if the Congress has the right to judge dereliction in office, and it is very clear it does, and to evaluate whether moneys are being spent efficiently and economically and a variety of other questions, including funds for raising the army, I do not think that this power of inquiry can be construed narrowly.

I would hope from the standpoint of the relations of the two branches that the President, whoever he might be, would not construe it and would understand that his office would have much greater meaning in the context of your general remarks if he seeks to deal openly insofar as possible with the American people and the Congress.

Mr. WHITE. I do not disagree with a thing you have said, Congressman. I believe, truthfully, that most administrations try to do so. It is when they get to the tough ones, and obviously there is no tougher one than Vietnam, that some of these principles begin to brush up against the real world in which we live.

I think we are really seeing a demonstration of that going on at this very moment, where because documents that were unknown to participants did make their way into the press, they are now available in one form or another, and I presume that when 2 more weeks have gone by they will have been pretty generally available throughout the country.

Mr. REID. Did you find any presumption—I might say when I served in the Eisenhower administration I found, if not presumption, a certain reluctance on the point I am about to make, namely, in the first instance, presumption that perhaps Congress really couldn't be trusted and security matters were much better left to the executive. But in fact there is no more reason to say that a Member of Congress is any more or less patriotic than any member of the executive, and therefore there should be no distinction, it seems to me, on the rights of an individual to sensitive information.

But you were in the executive. When I was there, we were afraid to level with the Congress, and it almost invariably led to misunderstanding and lack of the kind of relationship that is so badly needed today. How did you see that in your period of office?

Mr. WHITE. First, a minor disqualification: Most of my substantive efforts when I was on the White House staff were on the domestic side, so I really missed most of the national security matters. A few things I was involved in did brush into it. But I would be very candid with you, there is some tendency—it is not pervasive—but it exists. I should say "was"—I don't know what is going on in the White House today and I don't know what went on after I left in 1966. But to some extent within the executive branch, and that goes back to the point I was talking about, the gamesmanship. It is a terrible thing; I hope there is some way that we can bring this thing down instead of escalating it, where it is the Congress on one side and the executive branch on the other. All of you are accountable to the people and you all have the same basic objectives and you are all honorable men. You can be trusted with confidences.

That is what I deplore. If there were some way to pull that down where there is a greater mutual trust and confidence, I think we will have gone a long way toward satisfying the public unrest that exists today.

Mr. REID. Professor Bishop, might I ask you one question about *McGrain* v. *Daugherty*, particularly relating to the investigatory power or the power of inquiry of the Congress. In that decision—I believe it was in 1927—it was held the power of inquiry, the power to enforce, is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in the American legislature before the Constitution was framed and ratified.

Would you care to comment on the width and breadth of the power of inquiry as you have understood it?

Mr. BISHOP. I haven't read *McGrain* v. *Daugherty* for some time but if I remember right that Daugherty was not the Attorney General, but his brother, who was purely a private citizen. Now obviously Congress has a power to investigate whatever has anything to do with its legislative function.

Mr. REID. Do you see any limits on that?

Mr. BISHOP. The limits which the Supreme Court put on in the *Rumely* case and some others, that some types of investigations have no conceivable relationship with any possible legislation, so in those cases perhaps a person who refuses to answer questions could not be punished for contempt of Congress. Other than that, I don't.

Mr. REID. Assuming there is a relationship with a legislative function?

Mr. BISHOP. No; then I don't see any limitation on Congress' right to investigate. But I am not sure that that answers the question of Congress' power to compel the President to produce information.

Mr. REID. Would you be prepared to say that congressional power is pre-eminent in that area as a matter of constitutional principle? How to give effect to this being a somewhat different question——

Mr. BISHOP. There is certainly the difference between the right and the remedy.

No; I don't think I would be prepared to say, leaving the remedy to one side and talking about the right only, that in every case Congress has a right to compel the President to produce a particular piece of information. I can imagine cases in which the President would be within his constitutional rights in keeping to himself some piece of information.

Mr. REID. Would that extend——

Mr. BISHOP. They wouldn't be very common cases, I might add, they would be rare.

Mr. REID. Would that extend to the President covering up malfeasance in office or matters that are embarrassing to the Executive?

Mr. BISHOP. Certainly not. There he would have no right. I think no view of the Constitution would make that a legitimate power of the President.

Mr. REID. So what you would say, if I may paraphrase it, is that the congressional right of inquiry is virtually without limit except under the clear caveat that it must be related to a constitutional and clear legislative purpose and that in any event, the Executive could not deny for reasons of embarrassment or poor conduct?

Mr. BISHOP. Yes. What I am trying to say is that there could be circumstances, and I think they would be very abnormal circumstances, in which the President would have a constitutional right to withhold information, but they would certainly not include information which is withheld for no better reason than to prevent political embarrassment.

Mr. REID. What is your view of the accountability of the President or the Office of the Presidency if the President seeks to deceive or to put it another way, fails to clearly account, deliberately, and through instructions that are written in the Executive, on matters that are fundamental and basic to the Congress and the American people? Is this starting to enter the area of dereliction of office?

Mr. BISHOP. If the President withholds information for which there is no justification for withholding, which has no reasonable connection with major aspects of national security, I would call that dereliction: yes.

Mr. REID. Thank you very much, Professor Bishop.

Mr. MOORHEAD. Mr. Moss.

Mr. Moss. Mr. White, I want to acknowledge at this time the great help you gave the subcommittee when you were Associate Counsel to the President and we were working on the Information Act. I think without that help and understanding in the White House, we would never have resolved the many, many areas of conflict which at times seemed well beyond the competence of any of us to resolve.

We have such an act on the books today. That we have it I think is due in large measure to the assistance you gave the committee.

Mr. WHITE. They used to call me "Old Sell-out" at the White House, Congressman.

Mr. Moss. We are pleased to have you on our side.

In your statement you comment on the doctrine of Executive privilege. I am going to discuss that, but I think it should be very clear that Executive privilege is not the matter before this committee at this time. It has not been asserted at any point in the controversy surrounding the Pentagon papers. I think that that is a general designation of those papers. And the efforts to publish by four newspapers. But as a doctrine, isn't it true that for every case where a President has successfully asserted it, it is possible to find a case where he has buckled and supplied it?

Mr. WHITE. Oh, I would say the ratio is a lot more favorable than that. It is probably 20 where they buckled for one that they have stood straight.

President Kennedy had this problem with the Stennis hearings on Secretary McNamara's speech editing, and he was advised that he had committed himself formally and publicly to personally invoke the privilege, and he wanted to make it clear, and did, I think, in press conference questions, that because he was invoking it in that particular instance did not mean he was going to invoke it in any other instance.

So the answer is yes, but even stronger than you put it.

Mr. Moss. I want to indicate my agreement that it would be almost impossible to draft statutory language that would deal with the question of Executive privilege. The Executive asserts it, I don't recognize it; I don't think most of the members do, but if it is going to be claimed, we want it to be very narrowly claimed and confined to the President himself and not to the entire executive branch of Government.

Now three Presidents have agreed that that is the case. But we are concerned here with the exercise of a classification power in the executive branch. You indicate concurrence that a lot of material has been classified without proper foundation. Mr. Goldberg indicates 75 percent; the flag officers who appeared at the time of the Coolidge Commission report indicated close to 95 percent. That is a very substantial amount of material that is not properly classified.

Mr. WHITE. I think so. As I suggested, most of my actual activities did not bring me in touch with the military or national security classified material. But I certainly have that impression on the basis of what I did see. And yet, this is an understandable tendency, I think the report of the subcommittee spoke about it—hardly anybody gets criticized for overclassifying.

Mr. Moss. There is no penalty for overclassification; that is correct.

Mr. WHITE. No; other than administrative, within the discretion of a Department head or agency. This could be worked on. I agree on this

end of it; it is possible that some, either accord between the Congress and the executive branch or some legislative enactment could be constructive.

Mr. Moss. That is what I wanted to get to next.

On page 7 you state:

> I do not believe that any additional statutory formulation is required.

You were referring there only to the Executive privilege and not to the problems connected with a classification program?

Mr. WHITE. That is correct.

Mr. Moss. In that area, would you feel it desirable that the Congress attempt to lay down clear legislative policy and guidelines?

Mr. WHITE. I would think it would be useful to explore that, Congressman. I just don't have enough personal experience to know whether it is possible to do it. But being optimistic about it, I think it ought to be undertaken and that the executive branch can certainly give you a fairly fast response as to why it shouldn't be here.

My hunch is you would be able to produce something useful and constructive.

Mr. Moss. When you refer to the experience you had in the White House, you were designated as the staff member to handle appeals under 10501, were you not?

Mr. WHITE. Yes, sir.

Mr. Moss. And the reason why many cases were not appealed to the White House, I think, is because they were appealed to this committee?

Mr. WHITE. That could well be.

Mr. Moss. And there was never any effort under Johnson or Kennedy or Eisenhower or Truman to publicize the fact as to the nature of the appeal procedure available or who the person was designated to handle appeals, was there?

Mr. WHITE. I don't think that there was some secrecy clamp that was put on it. But I remember no publicity. Although in candor, I do recall that this subcommittee has a pretty effective way of getting to the press.

Mr. Moss. Weren't you designated after the committee inquired as to who was handling this in the White House?

Mr. WHITE. Yes, it was in response to an inquiry, I believe, from you.

Mr. Moss. Mr. Chairman, I am not certain who is handling the appeals in the White House.

Mr. WHITE. In my prepared statement I suggested that that should be something that is done.

Mr. Moss. I would suggest we make an inquiry. I think it may be the same pattern that existed under the Kennedy administration; when the committee inquired, Mr. White was designated. It is perfectly possible that no one is now.

Mr. MOORHEAD. The staff has made an inquiry. I don't know if we have a conclusive answer.

Mr. PHILLIPS. If I could comment on that question, under President Nixon's March 24, 1969, memorandum of procedures, the legal counsel to the President is designated as recipient of information from the Department of Justice and from the executive departments and agencies to resolve any question as to whether or not executive privilege should be invoked.

Mr. Moss. No. We are not talking about executive privilege. We are talking now about classification. The two are distinctly separate subjects.

Mr. Phillips. On the question of classification, we have been informed that there is a gentleman at the White House assigned for this. He has been invited to appear as a witness.

Mr. Moss. What is his name?

Mr. Phillips. John Wesley Dean III.

Mr. Moss. I am pleased to learn I was in error, that they have designated someone.

Mr. Moorhead. This is not conclusive fact, is it?

Mr. Phillips. We have been informed informally of this, and we have addressed a letter to him, inviting him to testify before this subcommittee on Wednesday next.

Mr. Moss. Professor Bishop, this morning—I want to apologize for leaving before your statement was concluded, I was trying to make a rollcall.

You said there should be a showing of a reasonable relationship between security and the classification. You were talking of it in context of a case similar to one now involving the New York Times as a means of justifying the imposition of prior restraint.

Mr. Bishop. Yes, sir.

Mr. Moss. For any remedy so drastic covering a first amendment right, shouldn't the showing be so clear and convincing of an unquestioned present danger at the bare minimum, a reasonable relationship that that is easy to establish, but it should go beyond that, shouldn't it?

Mr. Bishop. It would also have to be a genuinely important security interest, not a peripheral one.

Mr. Moss. What is an important security interest?

Mr. Bishop. Well, I would give an example.

It is easier to give an example than to try to draft a definition. Perhaps the plans of the Strategic Air Command for the defense of the United States in the event of nuclear attack or some other horrendous military secret. If it were possible to prevent the publication of some secret of that caliber, then I would say that that was the kind of security interest which would jusify prior restraint.

Mr. Moss. You are saying it would be an immediate danger, beyond any shadow of a doubt?

Mr. Bishop. I think that hypothetical that I gave you might be called that. I'm not a military expert.

Mr. Moss. Suppose there are 15 of these plans, and one is published?

Mr. Bishop. You take me out of my department. I am not enough of a military expert to even give a good illustration of the kinds of military secrets.

Mr. Moss. Let's take another danger to the security of the Nation. Under our Constitution the final power to govern is vested in the people, is it not?

Mr. Bishop. That is a complex question. The final power to elect is vested in the people.

Mr. Moss. Let's say next year they will have the final power to determine the course of government for at least 4 years.

Mr. BISHOP. They will have the final power to determine who shall be President and who shall constitute the Congress, but the Supreme Court will still be sitting there.

Mr. Moss. It is rather an awesome power, is it not?

Mr. BISHOP. Yes, it is.

Mr. Moss. It should be exercised by intelligent people fully informed?

Mr. BISHOP. Yes; I agree with that.

Mr. Moss. Do you think there is greater danger to a nation or a government that has lost the confidence of its people as there could be from some combination of external forces that threaten the nation?

Mr. BISHOP. I think the desirability of informing the public is a very heavy weight in the scale. It is extremely important. It would take something extremely heavy on the other side of the scale to tip the scale against it. I will put it that way.

Mr. Moss. In other words, you cannot envision this as being a real threat to the security of the Nation?

Mr. BISHOP. Can't envision what, sir?

Mr. Moss. The loss of confidence of the people.

Mr. BISHOP. Oh, indeed I can; yes. That is why I say it is enormously heavy and would take an enormously heavy weight on the other side of the scale to tip it the other way.

Mr. Moss. I see the chairman has an anxious gavel.

Mr. MOORHEAD. Mr. Horton.

Mr. HORTON. Thank you, Mr. Chairman.

Mr. Chairman, I do not believe that Executive Order 10501 has been placed in the record and I think it probably should be inserted. I would like to ask if it is not in the record that we put it in the record at this point.

Mr. MOORHEAD. Without objection, it will be inserted at an appropriate place.

(Executive Order 10501 follows:)

Executive Order No. 10501 [1]

SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES

Whereas it is essential that the citizens of the United States be informed concerning the activities of their government; and

Whereas the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

Whereas it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure;

Now, therefore, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

Section 1. *Classification Categories:* Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. These categories are defined as follows:

(a) *Top Secret:* Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

(b) *Secret:* Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized

[1] As amended by Executive Order No. 10816, May 7, 1959; Executive Order No. 10901, Jan. 9, 1961; Executive Order No. 10964, Sept. 20, 1961; and Executive Order No. 10985, Jan. 12, 1962.

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disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.

(c) *Confidential:* Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation.

SECTION 2. *Limitation of authority to classify:* The authority to classify defense information or material under this order shall be limited in the departments, agencies, and other units of the executive branch as hereinafter specified.

(a) In the following departments, agencies, and Governmental units, having primary responsibility for matters pertaining to national defense, the authority for original classification of information or material under this order may be exercised by the head of the department, agency, or Governmental unit concerned or by such responsible officers or employees as he, or his representative, may designate for that purpose. The delegation of such authority to clasify shall be limited as severely as is consistent with the orderly and expeditious transaction of Government business.

The White House Office
President's Science Advisory Committee
Bureau of the Budget
Council of Economic Advisers
National Security Council
Central Intelligence Agency
Department of State
Department of the Treasury
Department of Defense
Department of the Army
Department of the Navy
Department of the Air Force
Department of Justice
Department of Commerce
Department of Labor
Atomic Energy Commission
Canal Zone Government
Federal Aviation Agency
Federal Communications Commission
Federal Radiation Council
General Services Administration
Interstate Commerce Commission
National Aeronautics and Space Administration
National Aeronautics and Space Council
United States Civil Service Commission
United States Information Agency
Agency for International Development
Office of Emergency Planning
Peace Corps

President's Foreign Intelligence Advisory Board
United States Arms Control and Disarmament Agency

(b) In the following departments, agencies, and Governmental units, having partial but not primary responsibility for matters pertaining to national defense, the authority for original classification of information or material under this order shall be exercised only by the head of the department, agency, or Governmental unit without delegation:

Post Office Department
Department of the Interior
Department of Agriculture
Department of Health, Education, and Welfare
Civil Aeronautics Board
Federal Maritime Commission
Federal Power Commission
National Science Foundation
Panama Canal Company
Renegotiation Board
Small Business Administration
Subversive Activities Control Board
Tennessee Valley Authority

(c) Any agency or unit of the executive branch not named herein, and any such agency or unit which may be established hereafter, shall be deemed not to have authority for original classification of information or material under this order, except as such authority may be specifically conferred upon any such agency or unit hereafter.

SECTION 3. *Classification:* Persons designated to have authority for original classification of information or material which requires protection in the interests of national defense under this order shall be held responsible for its proper classification in accordance with the definitions of the three categories in section 1, hereof. Unnecessary classification and over-classification shall be scrupulously avoided. The following special rules shall be observed in classification of defense information or material:

(a) *Documents in General:* Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified defense information shall not be classified.

(b) *Physically Connected Documents:* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

(c) *Multiple Classifications:* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

(d) *Transmitted Letters:* A letter transmitting defense information shall be classified at least as high as its highest classified enclosure.

(e) *Information Originated by a Foreign Government or Organization:* Defense information of a classified nature furnished to the United States by a foreign government or international organization shall be assigned a classification which will assure a degree of protection

equivalent to or greater than that required by the government or international organization which furnished the information.

SECTION 4. *Declassification, Downgrading, or Upgrading:* When classified information or material no longer requires its present level of protection in the defense interest, it shall be downgraded or declassified in order to preserve the effectiveness and integrity of the classification system and to eliminate classification of information or material which no longer require classification protection. Heads of departments or agencies originating classified information or material shall designate persons to be responsible for continuing review of such classified information or material on a document-by-document, category, project, program, or other systematic basis, for the purpose of declassifying or downgrading whenever national defense considerations permit, and for receiving requests for such review from all sources. However, Restricted Data and material formerly designated as Restricted Data shall be handled only in accordance with subparagraph 4(a)(1) below and section 13 of this order. The following special rules shall be observed with respect to changes of classification of defense information or material, including information or material heretofore classified:

(a) *Automatic Changes:* In order to insure uniform procedures for authomatic changes, heads of departments and agencies having authority for original classification of information or material, as set forth in section 2, shall categorize such classified information or material into the following groups:

(1) *Group 1:* Information or material originated by foreign governments or international organizations and over which the United States Government has no jurisdiction, information or material provided for by statutes such as the Atomic Energy Act, and information or material requiring special handling, such as intelligence and cryptography. This information and material is excluded from automatic downgrading or declassification.

(2) *Group 2:* Extremely sensitive information or material which the head of the agency or his designees exempt, on an individual basis, from automatic downgrading and declassification.

(3) *Group 3:* Information or material which warrants some degree of classification for an indefinite period. Such information or material shall become automatically downgraded at 12-year intervals until the lowest classification is reached, but shall not become automatically declassified.

(4) *Group 4:* Information or material which does not qualify for, or is not assigned to, one of the first three groups. Such information or material shall become automatically downgraded at three-year intervals until the lowest classification is reached, and shall be automatically declassified twelve years after date of issuance.

To the fullest extent practicable, the classifying authority shall indicate on the information or material at the time of original classification if it can be downgraded or declassified at an earlier date, or if it can be downgraded or declassified after a specified event, or upon the removal of classified attachments or enclosures. The heads, or their designees, of departments and agencies in possession of defense information or material classified pursuant to this order, but not bearing markings for automatic downgrading or declassification, are hereby authorized to mark or designate for automatic downgrading

or declassification such information or material in accordance with the rules or regulations established by the department or agency that originally classified such information or material.

(b) *Non-Automatic Changes:* The persons designated to receive requests for review of classified material may downgrade or declassify such material when circumstances no longer warrant its retention in its original classification provided the consent of the appropriate classifying authority has been obtained. The downgrading or declassification of extracts from or paraphrases of classified documents shall also require the consent of the appropriate classifying authority unless the agency making such extracts knows positively that they warrant a classification lower than that of the document from which extracted, or that they are not classified.

(c) *Material Officially Transferred:* In the case of material transferred by or pursuant to statute or Executive order from one department or agency to another for the latter's use and as part of its official files or property, as distinguished from transfers merely for purposes of storage, the receiving department or agency shall be deemed to be the classifying authority for all purposes under this order, including declassification and downgrading.

(d) *Material Not Officially Transferred:* When any department or agency has in its possession any classified material which has become five years old, and it appears (1) that such material originated in an agency which has since become defunct and whose files and other property have not been officially transferred to another department or agency within the meaning of subsection (c), above, or (2) that it is impossible for the possessing department or agency to identify the originating agency, and (3) a review of the material indicates that it should be downgraded or declassified, the said possessing department or agency shall have power to declassify or downgrade such material. If it appears probable that another department or agency may have a substantial interest in whether the classification of any particular information should be maintained, the possessing department or agency shall not exercise the power conferred upon it by this subsection, except with the consent of the other department or agency, until thirty days after it has notified such other department or agency of the nature of the material and of its intention to declassify or downgrade the same. During such thirty-day period the other department or agency may, if it so desires, express its objections to declassifying or downgrading the particular material, but the power to make the ultimate decision shall reside in the possessing department or agency.

(e) *Information or Material Transmitted by Electrical Means:* The downgrading or declassification of classified information or material transmitted by electrical means shall be accomplished in accordance with the procedures described above unless specifically prohibited by the originating department or agency. Unclassified information or material which is transmitted in encrypted form shall be safeguarded and handled in accordance with the regulations of the originating department or agency.

(f) *Downgrading:* If the recipient of classified material believes that it has been classified too highly, he may make a request to the reviewing official who may downgrade or declassify the material after obtaining the consent of the appropriate classifying authority.

(g) *Upgrading:* If the recipient of unclassified information or material believes that it should be classified, or if the recipient of classified information or material believes that its classification is not sufficiently protective, it shall be safeguarded in accordance with the classification deemed appropriate and a request made to the reviewing official, who may classify the information or material or upgrade the classification after obtaining the consent of the appropriate classifying authority. The date of this action shall constitute a new date of origin insofar as the downgrading or declassification schedule (paragraph (a) above) is concerned.

(h) *Departments and Agencies Which Do Not Have Authority for Original Classification:* The provisions of this section relating to the declassification of defense information or material shall apply to departments or agencies which do not, under the terms of this order, have authority for original classification of information or material, but which have formerly classified information or material pursuant to Executive Order No. 10290 of September 24, 1951.

(i) *Notification of Change in Classification:* In all cases in which action is taken by the reviewing official to downgrade or declassify earlier than called for by the automatic downgrading-declassification stamp, the reviewing official shall promptly notify all addressees to whom the information or material was originally transmitted. Recipients of original information or material, upon receipt of notification of change in classification, shall notify addressees to whom they have transmitted the classified information or material.

SECTION 5. *Marking of Classified Material:* After a determination of the proper defense classification to be assigned has been made in accordance with the provisions of this order, the classified material shall be marked as follows:

(a) *Downgrading-Declassification Markings:* At the time of origination, all classified information or material shall be marked to indicate the downgrading-declassification schedule to be followed in accordance with paragraph (a) of section 4 of this order.

(b) *Bound Documents:* The assigned defense classification on bound documents, such as books or pamphlets, the pages of which are permanently and securely fastened together, shall be conspicuously marked or stamped on the outside of the front cover, on the title page, on the first page, on the back page and on the outside of the back cover. In each case the markings shall be applied to the top and bottom of the page or cover.

(c) *Unbound Documents:* The assigned defense classification on unbound documents, such as letters, memoranda, reports, telegrams, and other similar documents, the pages of which are not permanently and securely fastened together, shall be conspicuously marked or stamped at the top and bottom of each page, in such manner that the marking will be clearly visible when the pages are clipped or stapled together.

(d) *Charts, Maps and Drawings:* Classified charts, maps, and drawings shall carry the defense classification marking under the legend, title block, or scale in such manner that it will be reproduced on all copies made therefrom. Such classification shall also be marked at the top and bottom in each instance.

(e) *Photographs, Films and Recordings:* Classified photographs, films, and recordings, and their containers, shall be conspicuously and appropriately marked with the assigned defense classification.

(f) *Products or Substances:* The assigned defense classification shall be conspicuously marked on classified products or substances, if possible, and on their containers, if possible, or, if the article or container cannot be marked, written notification of such classification shall be furnished to recipients of such products or substances.

(g) *Reproductions:* All copies or reproductions of classified material shall be appropriately marked or stamped in the same manner as the original thereof.

(h) *Unclassified Material:* Normally, unclassified material shall not be marked or stamped *Unclassified* unless it is essential to convey to a recipient of such material that it has been examined specifically with a view to imposing a defense classification and has been determined not to require such classification.

(i) *Change or Removal of Classification:* Whenever classified material is declassified, downgraded, or upgraded, the material shall be marked or stamped in a prominent place to reflect the change in classification, the authority for the action, the date of action, and the identity of the person or unit taking the action. In addition, the old classification marking shall be cancelled and the new classification (if any) substituted therefor. *Automatic* change in classification shall be indicated by the appropriate classifying authority, through marking or stamping in a prominent place to reflect information specified subsection 4(a) hereof.

(j) *Material Furnished Persons Not in the Executive Branch of the Government:* When classified material affecting the national defense is furnished authorized persons, in or out of Federal service, other than those in the executive branch, the following notation, in addition to the assigned classification marking, shall whenever practicable be placed on the material, on its container, or on the written notification of its assigned classification:

> "This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U.S.C., Secs. 793 and 794, the transmission or revelation of which in any manner to an unauthorized person is prohibited by law."

Use of alternative marking concerning "Restricted Data" as defined by the Atomic Energy Act is authorized when appropriate.

SECTION 6. *Custody and Safekeeping:* The possession or use of classified defense information or material shall be limited to locations where facilities for secure storage or protection thereof are available by means of which unauthorized persons are prevented from gaining access thereto. Whenever such information or material is not under the personal supervision of its custodian, whether during or outside of working hours, the following means shall be taken to protect it:

(a) *Storage of Top Secret Information and Material:* As a minimum, Top Secret defense information and material shall be stored in a safe or safe-type steel file container having a three-position dial-type combination lock, and being of such weight, size, construction, or installation as to minimize the possibility of unauthorized access to, or the physical theft of, such information and material. The head of a department or agency may approve other storage facilities which afford equal protection, such as an alarmed area, a vault, a vault-type room, or an area under continuous surveillance.

(b) *Storage of Secret and Confidential Information and Material:* As a minimum, Secret and Confidential defense information and material

may be stored in a manner authorized for Top Secret information and material, or in steel file cabinets equipped with steel lockbar and a changeable three-combination dial-type padlock or in other storage facilities which afford equal protection and which are authorized by the head of the department or agency.

(c) *Storage or Protection Equipment:* Whenever new security storage equipment is procured, it should, to the maximum extent practicable, be of the type designated as security filing cabinets on the Federal Supply Schedule of the General Services Administration.

(d) *Other Classified Material:* Heads of departments and agencies shall prescribe such protective facilities as may be necessary in their departments or agencies for material originating under statutory provisions requiring protection of certain information.

(e) *Changes of Lock Combinations:* Combinations on locks of safekeeping equipment shall be changed, only by persons having appropriate security clearance, whenever such equipment is placed in use after procurement from the manufacturer or other sources, whenever a person knowing the combination is transferred from the office to which the equipment is assigned, or whenever the combination has been subjected to compromise, and at least once every year. Knowledge of combinations shall be limited to the minimum number of persons necessary for operating purposes. Records of combinations shall be classified no lower than the highest category of classified defense material authorized for storage in the safekeeping equipment concerned.

(f) *Custodian's Responsibilities:* Custodians of classified defense material shall be responsible for providing the best possible protection and accountability for such material at all times and particularly for securely locking classified material in approved safekeeping equipment whenever it is not in use or under direct supervision of authorized employees. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified defense information or material by sight or sound, and classified information shall not be discussed with or in the presence of unauthorized persons.

(g) *Telephone Conversations:* Defense information classified in the three categories under the provisions of this order shall not be revealed in telephone conversations, except as may be authorized under section 8 hereof with respect to the transmission of Secret and Confidential material over certain military communications circuits.

(h) *Loss or Subjection to Compromise:* Any person in the executive branch who has knowledge of the loss or possible subjection to compromise of classified defense information shall promptly report the circumstances to a designated official of his agency, and the latter shall take appropriate action forthwith, including advice to the originating department or agency.

SECTION 7. *Accountability and Dissemination:* Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy. Proper control of dissemination of classified defense information shall be maintained at all times, including good accountability records of classified defense information documents, and severe limitation on the number of such documents originated as well as the number of copies thereof reproduced. The number of copies of classi-

fied defense information documents shall be kept to a minimum to decrease the risk of compromise of the information contained in such documents and the financial burden on the Government in protecting such documents. The following special rules shall be observed in connection with accountability for and dissemination of defense information or material:

(a) *Accountability Procedures:* Heads of departments and agencies shall prescribe such accountability procedures as are necessary to control effectively the dissemination of classified defense information, with particularly severe control on material classified Top Secret under this order. Top Secret Control Officers shall be designated, as required, to receive, maintain accountability registers of, and dispatch Top Secret material.

(b) *Dissemination Outside the Executive Branch:* Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

(c) *Information Originating in Another Department or Agency:* Except as otherwise provided by section 102 of the National Security Act of July 26, 1947, c. 343, 61 Stat. 498, as amended, 50 U.S.C. sec. 403, classified defense information originating in another department or agency shall not be disseminated outside the receiving department or agency without the consent of the originating department or agency. Documents and material containing defense information which are classified Top Secret or Secret shall not be reproduced without the consent of the originating department or agency.

SECTION 8. *Transmission:* For transmission outside of a department or agency, classified defense material of the three categories originated under the provisions of this order shall be prepared and transmitted as follows:

(a) *Preparation for Transmission:* Such material shall be enclosed in opaque inner and outer covers. The inner cover shall be a sealed wrapper or envelope plainly marked with the assigned classification and address. The outer cover shall be sealed and addressed with no indication of the classification of its contents. A receipt form shall be attached to or enclosed in the inner cover, except that Confidential material shall require a receipt only if the sender deems it necessary. The receipt form shall identify the addressor, addressee, and the document, but shall contain no classified information. It shall be signed by the proper recipient and returned to the sender.

(b) *Transmitting Top Secret Material:* The transmission of Top Secret material shall be effected preferably by direct contact of officials concerned, or, alternatively, by specifically designated personnel, by State Department diplomatic pouch, by a messenger-courier system especially created for that purpose, or by electric means in encrypted form; or in the case of information transmitted by the Federal Bureau of Investigation, such means of transmission may be used as are currently approved by the Director, Federal Bureau of Investigation, unless express reservation to the contrary is made in exceptional cases by the originating agency.

(c) *Transmitting Secret Information and Material:* Secret information and material shall be transmitted within and between the forty-

eight contiguous States and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for Top Secret information and material, by authorized courier, by United States registered mail, or by the use of protective services provided by commercial carriers, air or surface, under such conditions as may be prescribed by the head of the department or agency concerned. Secret information and material may be transmitted outside those areas by one of the means established for Top Secret information and material, by commanders or masters of vessels of United States registry, or by the United States registered mail through Army, Navy, Air Force, or United States civil postal facilities; provided that the information or material does not at any time pass out of United States Government control and does not pass through a foreign postal system. For the purposes of this section registered mail in the custody of a transporting agency of the United States Post Office is considered within United States Government control unless the transporting agent is foreign controlled or operated. Secret information and material may, however, be transmitted between United States Government or Canadian Government installations, or both, in the forty-eight contiguous States, the District of Columbia, Alaska, and Canada by United States and Canadian registered mail with registered mail receipt. Secret information and material may also be transmitted over communications circuits in accordance with regulations promulgated for such purpose by the Secretary of Defense.

(d) *Transmitting Confidential Information and Material:* Confidential information and material shall be transmitted within the forty-eight contiguous States and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for higher classifications, or by certified or first-class mail. Outside those areas confidential information and material shall be transmitted in the same manner as authorized for higher classifications.

(e) *Within an Agency:* Preparation of classified defense material for transmission, and transmission of it, within a department or agency shall be governed by regulations, issued by the head of the department or agency, insuring a degree of security equivalent to that outlined above for transmission outside a department or agency.

SECTION 9. *Disposal and Destruction:* Documentary record material made or received by a department or agency in connection with transaction of public business and preserved as evidence of the organization, functions, policies, operations, decisions, procedures or other activities of any department or agency of the Government, or because of the informational value of the data contained therein, may be destroyed only in accordance with the act of July 7, 1943, c. 192, 57 Stat. 380, as amended, 44 U.S.C. 366–380. Non-record classified material, consisting of extra copies and duplicates including shorthand notes, preliminary drafts, used carbon paper, and other material of similar temporary nature, may be destroyed, under procedures established by the head of the department or agency which meet the following requirements, as soon as it has served its purpose:

(a) *Methods of Destruction:* Classified defense material shall be destroyed by burning in the presence of an appropriate official or by other methods authorized by the head of an agency provided the resulting destruction is equally complete.

(b) *Records of Destruction:* Appropriate accountability records maintained in the department or agency shall reflect the destruction of classified defense material.

SECTION 10. *Orientation and Inspection:* To promote the basic purposes of this order, heads of those departments and agencies originating or handling classified defense information shall designate experienced persons to coordinate and supervise the activities applicable to their departments or agencies under this order. Persons so designated shall maintain active training and orientation programs for employees concerned with classified defense information to impress each such employee with his individual responsibility for exercising vigilance and care in complying with the provisions of this order. Such persons shall be authorized on behalf of the heads of the departments and agencies to establish adequate and active inspection programs to the end that the provisions of the order are administered effectively.

SECTION 11. *Interpretation of Regulations by the Attorney General:* The Attorney General, upon request of the head of a department or agency or his duly designated representative, shall personally or through authorized representatives of the Department of Justice render an interpretation of these regulations in connection with any problems arising out of their administration.

SECTION 12. *Statutory Requirements:* Nothing in this order shall be construed to authorize the dissemination, handling or transmission of classified information contrary to the provisions of any statute.

SECTION 13. *"Restricted Data," Material Formerly Designated as "Restricted Data," Communications Intelligence, and Cryptography:* (a) Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 30, 1954, as amended. "Restricted Data," and material formerly designated as "Restricted Data," shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and the regulations of the Atomic Energy Commission.

(b) Nothing in this order shall prohibit any special requirements that the originating agency or other appropriate authority may impose as to communications intelligence, cryptography, and matters related thereto.

SECTION 14. *Combat Operations:* The provisions of this order with regard to dissemination, transmission, or safekeeping of classified defense information or material may be so modified in connection with combat or combat-related operations as the Secretary of Defense may by regulations prescribe.

SECTION 15. *Exceptional Cases:* When, in an exceptional case, a person or agency not authorized to classify defense information originates information which is believed to require classification, such person or agency shall protect that information in the manner prescribed by this order for that category of classified defense information into which it is believed to fall, and shall transmit the information forthwith, under appropriate safeguards, to the department, agency, or person having both the authority to classify information and a direct official interest in the information (preferably, that department, agency, or person to which the information would be transmitted in the ordinary course of business), with a request that such department, agency, or person classify the information.

Historical Research: As an exception to the standard for access prescribed in the first sentence of section 7, but subject to all other provisions of this order, the head of an agency may permit persons outside the executive branch performing functions in connection with historical research projects to have access to classified defense information originated within his agency if he determines that: (a) access to the information will be clearly consistent with the interests of national defense, and (b) the person to be granted access is trustworthy; *Provided,* that the head of the agency shall take appropriate steps to assure that classified information is not published or otherwise compromised.

SECTION 16. *Review to Insure That Information Is Not Improperly Withheld Hereunder:* The President shall designate a member of his staff who shall receive, consider, and take action upon, suggestions or complaints from non-Governmental sources relating to the operation of this order.

SECTION 17. *Review to Insure Safeguarding of Classified Defense Information:* The National Security Council shall conduct a continuing review of the implementation of this order to insure that classified defense information is properly safeguarded, in conformity herewith.

SECTION 18. *Review Within Departments and Agencies:* The head of each department and agency shall designate a member or members of his staff who shall conduct a continuing review of the implementation of this order within the department or agency concerned to insure that no information is withheld hereunder which the people of the United States have a right to know, and to insure that classified defense information is properly safeguarded in conformity herewith.

SECTION 19. *Unauthorized Disclosure by Government Personnel:* The head of each department and agency is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been knowingly responsible for any release or disclosure of classified defense information or material except in the manner authorized by this order, and where a violation of criminal statutes may be involved, to refer promptly to the Department of Justice any such case.

SECTION 20. *Revocation of Executive Order No. 10290:* Executive Order No. 10290 of September 24, 1951 is revoked as of the effective date of this order.

SECTION 21. *Effective Date:* This order shall become effective on December 15, 1953.

Mr. HORTON. I assume we have established Executive Order 10501 as amended is in full force and effect? Has that been established?

Mr. REID. Would the gentleman yield on that?

Mr. HORTON. Yes.

Mr. REID. If you ask whether it has been in full force and effect, the answer is it has been in force but it has not been effective and it has not been adhered to. And, indeed, the New York Times documents contain an extra legal classification prohibited by the Executive order because the classification is "top secret-sensitive," whereas the Executive order says there shall be no classification other than the three enumerated ones, the top one being "top secret."

Mr. HORTON. The question of whether or not something is in violation of the Executive order is not the point I was trying to make. The point I was trying to make is whether or not Executive Order 10501 is in effect.

Mr. Moss. Would the gentleman yield?

Mr. HORTON. Yes.

Mr. Moss. I think the status of Executive Order 10501 is that the executive department regards it as in full force and effect. I think there are Members of Congress who question the legal foundation for Executive Order 10501. I happen to be one.

Mr. HORTON. I understand. The question was whether it is in effect and whether it is being recognized. I guess the answer to that is yes.

As I understand it, Mr. White, we have talked about executive privilege, and that executive privilege is as has been outlined by the former chairman of the subcommittee, Mr. Moss. We have put in the record a series of letters, one of January 28, 1969, from the then chairman of the subcommittee, Mr. Moss, to the President, Mr. Nixon, and then a reply from Mr. Nixon of April 7, 1969 in which he indicates that:

> As you will note, the claim of the executive privilege has been the subject of much debate since George Washington first declared a Chief Executive must exercise the discretion. I believe and I have stated earlier that the scope of the executive privilege must be narrowly construed. Under this administration executive privilege will not be asserted without specific Presidential approval.

Then the President encloses a memorandum for the heads of the executive departments and agencies.

Now, that is the manner in which the executive privilege function is set forth.

The other piece of information in this whole area is the Public Information Act which was passed in 1966, known as the Freedom of Information Act. That, of course, spells out by statute specifically what records and other information shall be made public and what shall be exempt from public disclosure.

Now, that is a very complicated set of rules and regulations and statutes that govern this whole area that we are talking about. Of course, the subject that is specifically before us has to do with, as has been mentioned, the matter of classification or declassification of the Pentagon reports. This morning I asked Mr. Goldberg whether or not he felt there was a need for additional legislation. He said he felt there was. Do you feel there is a need for additional legislation in any one of these areas? And, if so, which one?

Mr. WHITE. In terms of executive privilege, I believe not. I believe no legislative formulation would be helpful. So far as I am aware, the

Freedom of Information Act is working moderately well, if not somewhat better, and I am not aware of any amendments to that that have been proposed or ought to be proposed.

The third category of the classification and declassification of documents, I am not prepared to say that I know that legislation ought to be enacted. I am prepared to say that I think there certainly are some troublesome areas here and it is worth a good look by the Congress to determine whether they could make more out of it than we presently have.

I am inclined to think the answer is yes, but I am not enough of a student of it. I have not seen any proposals that I believe are yet sufficiently formulated for me to say yes unqualifiedly.

Mr. HORTON. Professor Bishop, could I address the same question to you?

Mr. BISHOP. I do not think I could give a better answer than Mr. White did. That is about what I would say.

Mr. HORTON. In other words, the question that seems to be most important has to do with the question of classification and declassification.

Do you have any suggestions, Professor Bishop, with regard to this troublesome field?

Mr. BISHOP. Well, I think it is a question which stands a better chance of being, if not resolved, at least ameliorated, than the ultimate question of the privilege of the President. And I guess that there is room for improvement in the present procedures relating to classification and declassification.

I think the problem could stand study both in the executive branch and in Congress.

I find it difficult to imagine any further definitions of these categories or the justifications for classification which would be much more helpful than the rather general ones you already find in Executive Order 10501. It is an awfully tough thing to define much more specifically than that.

Perhaps you could have a more strictly enforced presumption that after *x* years—and I do not know what a reasonable period would be—any document ought to be declassified and that there ought to be a considerable burden on the people who want to retain the classification to satisfy perhaps an independent commission that there is reason for that classification.

Mr. HORTON. Do either of you feel that there is a difference between what should be made available to the Congress and what should be made available to the public in general?

Mr. BISHOP. Oh, I think there is a difference, yes, sir. While the public certainly has an interest in being informed, there are all kinds of things which perhaps are quite rightly classified, or perhaps are only debatably rightly classified, which have mighty small connection with the kind of information that the public needs in order to vote intelligently. Whereas the Congress is going to get into a good many nitty-gritty specifics, what is in fact the type of problem which would not be, I think, of a great deal of interest to the public at large.

Mr. HORTON. Do you have any suggestions with regard to what should be classified and kept from the public and from the Congress?

Mr. BISHOP. I think they are two different problems.

Mr. HORTON. I asked Mr. Goldberg this morning if you had to draw a line, where would you draw the line? What would you include inside of the circle that would be classified? In other words, what would be the basis on which you would classify information?

Mr. BISHOP. Well, obviously that could be only answered in generalities which perhaps are phrased a little differently from the generalities we already have. Where Congress is concerned I would be willing to say that nothing should be withheld unless there is—assuming that Congress asks the question for a reason connected with its legislative function—that nothing should be withheld unless there is some really quite gigantic national interest in keeping it absolutely secret with the President and perhaps his closest advisers.

Where the public is concerned, I suppose I would weigh whatever the desirability of keeping it classified is against whatever real interest the public might have in knowing it.

Very often, of course, I do not think the public would be much better off if it did know the contents of some of the millions of documents.

Mr. HORTON. One of the problems we have had to deal with relates to what is classified. The Congress does not know what is classified. Would either one of you suggest that it might be well to have the Freedom of Information Act amended so that it would require someone from the executive to report to the Congress each year a list of all of the items which are classified and the classification of those items?

Mr. WHITE. It strikes me as a useful suggestion, Congressman. I don't know what the executive branch's reaction would be, but it could have a salutary effect in reducing the overclassification problems.

May I say there is one other aspect of this that has not been touched upon that to me is perhaps the most troubling. When you have classified documents and Presidents and executives and newspapers clearly violate the requirements of the order, regardless of whether it is legal or not, it seems to me we have something akin to the problem we had with the prohibition law, everybody says, "everybody else is doing it," even though it is perhaps morally wrong to do it. I think this is troubling and it must be to young people who say they get thrown in the clink when they violate the law and the New York Times violates the law and everything is all right.

In short, it is an old problem, that of trying to have the law and regulations reasonable, so that they can be enforced and the people don't ignore them because of their unreasonableness. As I say, I think this is a little bit disturbing. If I were about 25 years younger, I might wonder why we are all so solicitious of the New York Times, and not about the kids out here who, some of them claim they were not even violating the law.

So to some extent if you are able to make it a law, and in making the law presumably having to go through the test of congressional action, it might eliminate one of these little irritants in our society.

Mr. MOORHEAD. Mr. Erlenborn.

Mr. ERLENBORN. Thank you, Mr. Chairman. I would like to follow up on the comment you just made because I think it is a very important observation. Let me ask you, both you and the professor.

Take the case of the Times, we might as well talk about that be-

cause it is the outstanding case right now. When this material came into their possession, under the Executive order and under the Freedom of Information Act, were procedures available to the Times to have the material declassified or to go to court to have a court finding that it was not properly classified and should then be made available?

Mr. WHITE. I will hazard a guess. I think the answer is yes. But one word you didn't put in, were "effective" techniques available. So I don't know if you add that word whether I could say yes. Then there is also the problem, and I have never been in the newspaper business, but I presume there is something called the competitive edge that must have weighed heavily on them if I read it correctly.

Mr. REID. I never heard of that, Mr. White.

Mr. ERLENBORN. If these procedures were available and the papers didn't at least try to utilize these procedures, are they not then sort of setting themselves above the law in making their own determination without going to the courts or going through the appeal procedure? And what sort of an example is this to youth and others, that they can obey those laws that they wish to and ignore those laws that they feel they don't have to obey?

Mr. WHITE. I think not for the same reason that people who in the early 1960's engaged in civil disobedience, running the risk of having to pay whatever penalty there was, did it knowingly. I don't know, I didn't sit in the New York Times' board room when they made this decision. They may have said some of us fellows will wind up in the clink. So that is up to them. I think my answer to your question is no, if I understood the question.

Mr. ERLENBORN. I know and appreciate your answer to it, and I know the reference that you make. It seems to me that there are two separate and very distinct theories here. Civil disobedience, to call attention to the fact that people were not allowed to sit at a lunch counter in the South, were required to sit in a particular place in the bus, is meant to test the constitutionality of laws that made such requirements. And the one who performed this civil disobedience then, of course, became subject to prosecution and the laws could be tested. It seems to me there is an altogether different question when civil disobedience takes the form of bombing an ROTC building to call attention to one's cause. I can't relate the one to the other or put them in the same category, can you?

In other words, merely being ready to suffer the consequences of one's act does not make it morally or legally justified, does it?

Mr. WHITE. No, I think not. I guess each of us could have our own individual assessments of whether a particular act of either violating a law or civil disobedience, however you characterize it, is one that deep down we believe ought to be done at this point in time. And to some we will say "Yes," and to some we will say "No." I don't know enough about the New York Times situation, but if I understood Judge Gesell's decision, he said that even though it may not be applicable, there is a criminal statute under which they can be prosecuted for having done something. And we are now back to the prior restraint and punishment afterward issue that Professor Bishop discussed.

Mr. ERLENBORN. Professor, would you address yourself to this question about being willing to accept the consequences of one's act.

Mr. BISHOP. I think there are two distinct types of civil disobedience. One type says we don't think that the law which prohibits what we are doing is a constitutional law, so we are going to test that out. The other one consists of violating an admittedly constitutional law to make sort of a political point. And the person who does that ought to be perfectly prepared to take whatever the consequences are.

Mr. ERLENBORN. In which category would you put the Times' case?

Mr. BISHOP. I suppose—of course, the Times is not, not yet, being criminally prosecuted. If it were, it would come into my first category. In other words, I would assume that they would take the position that the Government, the executive and Congress together, could not constitutionally prohibit them or punish them for publishing this kind of information, because there is no constitutional privilege to withhold it.

Mr. ERLENBORN. Then in effect what they are saying is there should be no classification of Government documents, classification of secret or top secret or confidential, it is unconstitutional.

Mr. BISHOP. Not quite. I think what they are saying is these documents, these particular documents, could not constitutionally be classified, because they did not bear any reasonable relation to the national security. And that is one for the courts.

Mr. ERLENBORN. Now they are setting themselves up as the judge of that, without recourse to the appeals procedure or to the courts.

Mr. BISHOP. Unless they are criminally prosecuted.

Mr. ERLENBORN. Could we agree—I presume the two of you do agree—that it is necessary to the functioning of Government that we do have at least some documents that are classified as secret.

Mr. BISHOP. I would certainly agree with that, yes.

Mr. WHITE. Certainly, I have no problem with that.

Mr. BISHOP. Actually, I found myself discussing a couple of days ago with a group of my colleagues the question of whether there was any way in which the Times could have tested the propriety of this classification except publishing it and none of us were sure that there was any other method by which they could have brought the issue before the courts. Possibly they could have asked for a declaratory judgment, conceivably they could have asked for a writ of mandamus ordering the Secretary of Defense to declassify. But those would be quite complex questions. I am not sure those remedies were actually available.

Mr. ERLENBORN. If these remedies are not available, do you believe it would be desirable for Congress to fashion those remedies?

Mr. BISHOP. Yes, I think I will go out on a limb and say perhaps it would be a good idea if there were some method by which the propriety of a classification could be tested without running the risk of a criminal act.

Mr. ERLENBORN. Isn't there an appeal procedure under the Executive order? As I understand it, there is, one that would have been available to the Times in this situation.

Mr. WHITE. Yes, I think so-called section 16, which says if you have a problem, bring it in.

Mr. ERLENBORN. We have been talking about the Executive privilege and there are those who feel there is no such privilege. I don't know

that we have ever turned this around and talked about it or had any test cases of legislative privilege. Do you think that the President or his Cabinet officers or whoever it might be in the executive branch would have the right to require working papers of the congressional committees, memos from the staff to the chairmen, and so forth?

Mr. BISHOP. All I know is it has never happened to my knowledge. My memory goes back almost 20 years now. I did draft a letter for the Secretary of the Army to sign, suggesting that we would be happy to see the papers which, or the documents which, Senator McCarthy's committee said it had showing that some of our employees were Communists. We didn't get them. It was not by any means a demand, we weren't asserting any constitutional right, it was just a request, and it was ignored.

Mr. WHITE. May I say I have never even heard the idea approached seriously or facetiously anywhere.

Mr. ERLENBORN. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. McCloskey.

Mr. MOSS. I wonder if the gentleman would yield briefly?

Mr. MCCLOSKEY. I would enjoy that.

Mr. MOSS. A moment ago in a discussion here as to a procedure for appeal of Executive Order 10501 classifications, it is rather charitable to describe section 16 as a procedure for appeal; isn't it? It says the President shall designate a member of his staff who shall receive, consider and take action upon suggestions or complaints from nongovernmental sources relating to the operation of this order. It is hardly a procedure.

Mr. WHITE. I guess if you are using the word "procedure" in a legal sense, with all of the judicial protections and appeal rights; that is correct.

Mr. MOSS. It doesn't even conform to administrative procedure; does it?

Mr. WHITE. And sometimes that is not very good.

Mr. MOSS. But imperfect as it is, it is more of a procedure than this.

Mr. WHITE. You are right. I think what you have done has strengthened the response of both Professor Bishop and I, and that is there didn't seem to be any effective way. I kind of hate to go too flat on this, because there might have been some other alternatives and options open. But I agree this might have been tried. I don't know how effective it would have been.

Mr. MOORHEAD. We will recess briefly to answer the rollcall and come back.

(Recess.)

Mr. MOORHEAD. The subcommittee will resume.

The Chair recognizes the gentleman from California, Mr. McCloskey.

Mr. MCCLOSKEY. Gentlemen, I will address this question to both of you and either one of you might want to comment. On the narrow issue as to whether or not it is a crime for these newspapers to publish documents which have come into their possession, I can find no Federal statute on the books, which makes it a crime for a nongovernment employee to publish this type of information. Can you direct my attention to any?

Mr. BISHOP. I cannot. But I have not looked for one either. I yield to your research.

Mr. MCCLOSKEY. I was visited by the FBI yesterday with some questions about documents in my possession. I inquired of the FBI what statute was the foundation of their investigation. What alleged offense? And they referred me to title XVIII of the United States Code, section 798, which makes it a crime for disclosure of classified information which appears to relate to cryptographic materials, cryptographic machines, communication of intelligence activities of the United States or foreign governments which were obtained by communication intelligence.

Communication intelligence as defined in this statute, quite clearly refers to the design, construction, use, maintenance or repair of any device or apparatus prepared for use by the United States for cryptographic or communication intelligence purposes. So this particular code section would not seem to apply to the possession of classified documents.

Section 793 of title XVIII, and section 794, referred to the Espionage Act offenses, but there the specific intent to injure the United States or to aid a foreign government is required.

And the third possibility of a criminal offense by publishing these documents would, of course, be under the Executive order. But the Executive order, as I understand it, applies only to Federal employees, or ex-Federal employees. It would not apply to the New York Times or publishing houses.

Can you enlighten me on that? Is there any crime the newspapers may or may not have committed by publishing documents which fall into their hands that are classified?

Mr. BISHOP. I cannot add anything to that. I do not myself know of any statute.

Do you, Mr. White?

Mr. WHITE. I am not familiar with them, but the fact that I am not is really only a negative help, but there may well be. I do not hold myself out as an expert on that at all, and I am not familiar with it, but I have a hunch that Congressman McCloskey has probably looked harder than I might have looked.

Mr. ERLENBORN. Would the gentleman yield for a brief question?

Mr. MCCLOSKEY. Yes.

Mr. ERLENBORN. In the opinion of either of you, should it be a crime to publish classified documents?

Mr. WHITE. Classified meaning with the system we presently have?

Mr. ERLENBORN. Yes.

Mr. WHITE. This is certainly not my field of expertise, but I will hazard a guess. I think it probably is in the national interest to have some prohibition against publishing classified information.

Mr. MCCLOSKEY. That ties in with—excuse me.

Mr. BISHOP. I was about to say, subject to the caveat that it is information which has constitutionally been classified.

Mr. WHITE. Right.

Mr. MCCLOSKEY. That leads into my next question. I pose this on the basis that in recent weeks there has been some question whether or not executive branch employees have deliberately lied to Members of Congress or willfully concealed relevant information from Members

of Congress. Would either of you gentlemen foresee any objection to a law which would make it a crime for an employee of the executive branch of the Government to willfully deceive a Member of Congress or to willfully withhold material information, which was not classified, upon inquiry?

I say this against the background of my belief that Members of Congress would recognize the prerogative of the executive branch to say tentatively, we cannot give you that information, gentlemen, without checking with high authority, or, we want to check with the President to see if he will exercise his executive privilege.

But absent that particular circumstance, what about the case where an employee of the executive branch willfully deceives a Member of Congress who is making a bona fide inquiry of him? Can you see any problem in making that a crime?

Mr. BISHOP. In the first instance, isn't it a crime already? To commit perjury in testifying before a committee——

Mr. MCCLOSKEY. Perjury before a congressional committee, as you gentlemen are sworn under oath today, of course. Perjury——

Mr. BISHOP. Wouldn't these executive employees if they testify normally be under oath?

Mr. MCCLOSKEY. Testifying, yes, but the way the Congress operates, we direct inquiries on a daily basis to members of the executive branch. Let's take the SST, for example, where the executive branch declined to provide to the Congress the one report they had which was adverse to the SST last year. They gave us lots of reports, facts, and statistics that favored the SST; they declined to give us that other report.

Suppose on inquiry they told us we do not have any reports on the environmental impact of the SST that we have not already given you? That would be a lie. Do you see any problem in making that a criminal offense?

Mr. BISHOP. Well, I do not think I see any constitutional problem. I could see some ferocious problems of enforcement. In the first place you would have awful problems of proof in whether, in fact, the statement was true or not. Sure I can imagine a black and white case, but in the normal case the argument would be this thing which we withheld was not relevant and then you have an awful issue of fact.

Mr. MCCLOSKEY. Aside from problems of proof, because I can state to you several examples where I am confident any district attorney in this country would have no problem in establishing proof. If these papers that have been published in the New York Times are accurate, it indicates that high members of the executive branch willfully deceived Members of Congress. Do you see any problem in making a member of the executive branch guilty of a crime if he should so mislead a Member of Congress upon inquiry?

Mr. BISHOP. I do not see any constitutional problem. I hesitate right off the top of my head to make a decision as to whether this would be a wise piece of legislation. My initial instinct is to think that there are good policy arguments in favor of it. But it is something I would want to think about for quite a while before I decided that it is the kind of thing that Congress ought to pass.

Mr. MCCLOSKEY. You remember Mr. Sylvester's famous article, "The Government's Right to Lie."

Mr. BISHOP. I do not, as a matter of fact.

Mr. McCloskey. Mr. White, do you have any comments on this question?

Mr. White. It is a tough one, and somewhat like Professor Bishop I am a little hesitant to make the plunge. I fully see what you are driving at. I do not know enough about criminal law, and whether such language as "deceive" or "willfully mislead" is language that is sufficiently sharp to achieve what I assume to be your objective.

Mr. McCloskey. We have a number of laws of that kind phrased in almost identical language. People who submit deceptive income tax returns, or willfully mislead the Government when they submit information are subject to criminal sanctions. I comment on this because of the very real concern throughout the country that the Government does not respond in kind with the information that it disseminates to the public these days.

Mr. White. Well, it is such a strong dose of medicine, I guess my own experiences in the executive give me a little trouble. But I would not want it to be turned around to suggest that the reason it troubles me is because I was one who engaged in misleading or deceiving. I do not know what it would do to what I hope we can achieve, which is public confidence in the administration, if we have one branch of the Government saying to another branch of the Government in a formal fashion, we have passed a law because we do not trust you.

Mr. McCloskey. Mr. White, let me respond to that and raise the real nature of my inquiry, because I respected Mr. Justice Goldberg's suggestion that this Government works well if the various branches of Government can draw back from confrontation with one another. I recall *Marbury* v. *Madison* and the statement about Chief Justice Marshall: "He has made his ruling, now let him enforce it." He would have to depend upon employees of the executive branch to do that.

But I feel in your earlier testimony that neither of you recognized or mentioned the fact that impeachment is the ultimate check and balance over an Executive who lies or fails to faithfully execute the law. I want to test with you a philosophical thesis or historical thesis and get your response. It is simply this, that the history of the foundation of this country in the Constitutional Convention, which resulted in our present three-branch form of government, was based on the Articles of Confederation where we had only a Congress, no executive branch and no judicial branch.

In the debates that preceded the adoption of the Constitution, we provided that Congress had the primary powers, particularly the power to provide for the common defense, to raise the Army, to regulate commerce, and to raise money. These were the things that gave rise to the Constitutional Convention, the absence of these powers under the previous form of government.

In giving all of these powers to the legislative branch we set up the executive to insure that the laws were faithfully executed, but not to make the laws. The primary body of this government is still the body that makes the laws.

In view of this responsibility, the body that makes the laws must have absolute right to all information, all facts that bear on the wisdom and judicious nature of the laws, particularly the decisions to make war. We now confront the situation that the Congress has passed the Gulf of Tonkin resolution, which authorized the making of war for

many years and we find that if these documents are accurate, the Congress was willfully deceived by the Executive branch as to the facts involved in Southeast Asia, and as to the motivations of the executive branch.

I refer particularly to the 10 percent figure in the McNaughton memorandum that justified saving the South Vietnamese, while the executive branch was telling the Congress at that time that our primary goal was the saving of the South Vietnamese. If these documents are accurate, then the Congress has a real obligation to insist on complete information. This leads to the real tough constitutional question, should Executive privilege be invoked with respect to information which is necessary to the Congress to wisely execute our constitutional responsibility? And that means declaring war or continuing to fund a war.

Now, I do not think this question has ever been faced in the history of this country. We have always drawn back and permitted Executive privilege to be claimed, recognizing that the Executive had every reason to have this fairly narrow privilege. But the broadening and the extension of the practice and the use of that privilege now intrudes on the congressional ability to meet our constitutional obligations, at least as I see them.

Could you gentlemen comment on whether or not the Congress should now take rather strenuous steps to narrow this exercise of Executive privilege and to exercise legislative oversight in a far more rigorous way than we have thus far?

Mr. BISHOP. Well, I would stop short of saying that the Congress has absolute discretion to require the President to produce any information in his possession. I think even if Congress were to pass a statute requiring the President absolutely to produce anything which the Congress, through an appropriate committee or by resolution or whatever, requires him to produce, I think the President would probably, on the advice of the Attorney General, take the position that that act was unconstitutional.

Mr. MCCLOSKEY. Let me give you specific proof. Let us assume that the executive branch is running a covert war in Laos; and they are hiring Thai battalions to fight a war in Laos. We are bombing with B–52's and spreading defoliants in northern Laos, but the administration does not wish to reveal these facts to the House of Representatives of the United States.

In that specific case, do you feel that the House of Representatives should insist, before continuing to fund this effort in Laos, that we be fully advised of the nature of the CIA war there, the Thai operations there, and the bombing operations there?

Mr. BISHOP. That it can certainly do. That is a slightly different question.

Mr. MCCLOSKEY. Do you think we should?

Mr. BISHOP. In other words, that is a question for the Congress. And I am not a Member of the House or Senate. Certainly the Congress can always use its power of the purse to get the President to do what it wants. And, of course, in the huge majority of cases that is enough. They do get the information they want. But that is not quite the same thing as saying that the President must produce it—under threat of what?

Mr. McCloskey. Thus far, the Executive has chosen not to advise the House of Representatives of these facts that I have outlined to you.

Mr. Bishop. Then it is certainly the prerogative of the House of Representatives not to vote funds without getting that information.

Mr. McCloskey. Do you think it is our duty to get the information?

Mr. Bishop. I think that is a question for you gentlemen.

Mr. McCloskey. Mr. White?

Mr. White. I don't think I have any different response than Professor Bishop made on both grounds.

First, that power of the purse is one that is certainly the Congress', by the Constitution. And it may be tough medicine to say you won't get a military appropriations bill enacted until we have got information. But it is within the purview and prerogative of the Congress to do that.

As to whether it should, that, of course, is a congressional decision to make. I don't have enough feel for it, put in those terms, hypothetical, that you posed. It strikes me that the House would want to exercise its prerogative of withholding funds. But, as Professor Bishop says, that is really a House matter or congressional matter.

Mr. McCloskey. I think I have exhausted my time. Thank you, gentlemen.

Mr. Moorhead. Do you have any further questions?

Mr. Erlenborn. If I might just take another moment, I think that Representative McCloskey was asking several different questions that were not clearly delineated as being different questions.

At one point he was talking about the right of an individual Member of Congress to get information from the executive branch and some sanction being imposed on one who misled the individual member. This, I think, is an altogether different propostion than the Congress as an institution properly acting.

Mr. Bishop. I understood them as two different questions, yes.

Mr. Erlenborn. I think maybe you would agree too, that the Congress as an institution has more rights than individual Members of Congress to demand information.

Mr. McCloskey. I do.

Mr. Bishop. More power, too.

Mr. McCloskey. I think those are the differences that were described in the earlier testimony concerning, the resolution of inquiry, demands by a committee, and the lawsuit under the Freedom of Information Act. But I was concerned about the individual Congressmen, who on an almost daily basis, direct some questions to some agency. I am glad that the distinction is made.

Mr. Erlenborn. Thank you, Mr. Chairman.

Mr. Moorhead. The staff has a few questions. Mr. Phillips?

Mr. Phillips.

Mr. Phillips. Mr. Chairman, I have one brief question for Professor Bishop.

You have mentioned several times that you feel that Congress is entitled to information from the Executive which it requires to fulfill its legislative responsibilities under the Constitution. It that correct?

Mr. Bishop. I didn't mean to say categorically that it is entitled to any and all information.

Mr. Phillips. But broadly stated?

Mr. Bishop. Certainly in the huge majority of cases, yes.

Mr. Phillips. Of course, you know that the Government Operations Committee, of which this subcommittee is a part, has a great deal of investigative and oversight responsibility in the economy and efficiency of operations of hundreds of different programs. Did you mean to imply that you do not feel that this same type of information should be available from the executive to a committee in the discharge of its investigative responsibilities?

Mr. Bishop. No. Subject again to the limitations which the Supreme Court put on the investigative functions of Congress in the Rumely case and other cases. I think that is part, really, of its legislative functions.

Mr. Phillips. Much of the activities of our committee are not specifically geared to a piece of legislation; they are merely oversight into economy and efficiency. I just wanted to make sure that you are not limiting your reply to that one specific instance.

Mr. Bishop. No; I certainly didn't mean to go beyond what the Supreme Court said on that.

Mr. Phillips. Mr. White, I had a question on page 5 of your statement. In the second paragraph you state:

> When a department or agency is considering whether to withhold information, it must recognize that it has to make a case to the President or to the staff officer charged with the responsibility for screening requests to use executive privilege.

I think this is one of the most intriguing parts of this dilemma that we have been discussing here today. As I read this—and I would ask for your comment on it—it seems that what we are really saying here is under President Nixon's memorandum in which he sets up the procedure, if the head of an executive department or agency feels that he does not want to supply certain information to Congress that has been requested, either by a committee or by a member, he has to go through a specified procedure. It involves the legal counsel of the Department of Justice, a recommendation by the Attorney General of the counsel to the President, and the department head or agency head, of course, can appeal directly to the President or to the counsel for an opportunity to what you call "make his case."

Now, the thing that disturbs me about this is in situations where a Cabinet officer, for example, might wish the President to invoke executive privilege to hide an action that has been taken by his department that might tend to either embarrass him, the department, or the administration as a whole. And it seems to me that you put your finger in this one sentence on the broad dimension of this dilemma. Is there any way, from your experience in the White House, that we can really resolve this kind of a problem—where a political question is involved—whether or not to invoke executive privilege.

Mr. White. Well, my thesis is rather simple. It is if the President does it himself, as I think three Presidents in a row have said they will, it means he has to be personally involved and informed of the matter. And you are suggesting he might be persuaded by somebody within his administration that he should invoke the privilege for a matter that may not withstand public scrutiny if the public knew about it, to prevent some kind of embarrassment or to cover up a malfeasance or something else.

If the President directs the Secretary of Commerce, for example, to tell the Commerce Committee that he will not make that material available that has been requested, the President recognizes that he is then taking on the political burden of it. And my guess is somebody is going to have to make a very persuasive case to him. Partly for the reasons that I suggested in my statement, the first thing he knows is that, if it were a small problem, it will become bigger by his refusing to let the information go. And if he is committed, and has made it perfectly clear to all that, when the Secretary says to the Commerce Subcommittee, "You can't have it," it means the President says you can't have it. The President will have made a political judgment on the basis of what he thinks is in the best interests of the Nation, his own administration, and presumably himself.

But I think it is kind of self-policing and self-enforcing. There may be indeed a few things you won't be able to get that you would like to have, but, when I weigh the benefits of having that privilege continue, on admittedly a very narrow basis, against the possible detriments, it is very easy for me to say it ought to be continued.

Mr. PHILLIPS. Of course, I am talking about a situation where national defense or security is in no way involved. I am talking about a political situation, theoretical perhaps, but practical, I think—one every administration faces eventually.

Mr. WHITE. I can't really believe that the Congress is not resourceful enough to get hold of the data that has not been supplied and to use whatever political techniques, devices, and tricks are available to make the point. And all the President will have done by invoking the executive privilege will have been to magnify it. So there may be a real problem, I don't know of any that occurred. Frankly, I don't think in my mind it is a very serious difficulty to be concerned about.

Mr. PHILLIPS. I think you are quite correct when you say in cases such as this then the President is taking on his shoulders the political burden of invoking the executive privilege in such a situation.

But on a day-to-day basis, is it fair to burden a President with these kinds of decisions? The President is a very busy man; he has hundreds of important decisions to make each day. I am wondering to what extent a delegation of authority to his counsel in the invoking of executive privilege could water down even further the impact of executive privilege in highly sensitive defense and national security areas?

Mr. WHITE. I can only speak from personal experience, and after the President, President Kennedy, reached the decision that he would do it himself, invoke it only personally, it was stated in a letter to this subcommittee that was widely publicized. I am not aware of any instance where an employee or official of the executive branch, on his own, tried to invoke it. So the problems came to the White House, and it shrunk the number of problems the Congress had in getting material, I believe.

But perhaps the current White House staff can give you a little better feel for how it works mechanically. Presidents are busy, but this is a very important privilege and——

Mr. PHILLIPS. Not to be taken lightly.

Mr. WHITE. It couldn't have been. In my personal experience the decision was made by the President. It had to be. Because who in the world is about to exercise that privilege? Don't forget, there is, as we said, a very heavy political burden on the man who exercises it. He

really doesn't have to satisfy you—what he has to satisfy is the public, that his decision to withhold something will stand up under public scrutiny.

You can always fight with Congress, but if you believe he has withheld something he should not have, then you see if you can't find some way to elevate it to the point where the public takes cognizance of it, and then the President will perhaps reexamine whether he wants to exercise that prerogative.

Mr. PHILLIPS. I have one more question, Mr. Chairman, a constitutional question I would like to address to both of the witnesses.

The first amendment specifies that Congress shall make no law abridging the freedom of speech and press. The 14th amendment has the effect of extending to the States this same provision. But where the President acts in pursuance of his authority to conduct foreign relations as Commander in Chief, without the benefit of specific statutory authority from Congress, do first amendment protections always apply if such actions involve possible interferences with freedom of speech and the press?

Mr. BISHOP. Well, I can say unhesitatingly that I know of no judicial precedent on that. Certainly if you look at the literal wording of the amendment, the first amendment, I can't go further than to say that no one could be punished under, let us say, the Espionage Act, assuming it to be applicable, for handing out information which the President had classified without reasonable foundation. That is the only way in which I can see the problem being put in a judicial context.

Mr. WHITE. I think you have got me a little over my constitutional depth and I yield to Professor Bishop on this one.

Mr. BISHOP. I am out of mine, too, on this one.

Mr. PHILLIPS. This is the question I think Justice Goldberg alluded briefly to this morning. It involves the various portions of the Constitution that might come into conflict where we are dealing with the kind of situation where the President is acting in furtherance of his responsibilities under the Constitution in the foreign affairs and national defense areas and the limitation that is placed on Congress in passing no law that would abridge first amendment rights. This is why I asked the question to see if we could clarify that point.

Mr. MOORHEAD. I have one question, gentlemen.

You have all alluded to the fact that this personal use of the executive privilege by the President really rests on three letters that three Presidents have written to this subcommittee. It is quite possible that the next President of the United States or one down the line will not write that letter.

Should this personal exercise of privilege be written into law?

Mr. WHITE. I am not sure I know how it could, because even if the law were written, it would impose at least a moral obligation on the President, but I don't think it would have any legal or constitutional binding impact on him. Because if he wished to ignore it, you would be in the same boat you were in before. How are you going to enforce it against the President of the United States?

Mr. ERLENBORN. Would the chairman yield?

Mr. MOORHEAD. Yes.

Mr. ERLENBORN. It occurred to me when you were answering that that really the only way the question comes up is if some other member of his administration tries to assert this privilege and this itself becomes self-enforcing. If we deny to anyone except the President the right to assert this privilege, by the passage of a law, then the President himself would be the only one who could assert the privilege, because no one else really has it in the first place, do they?

In other words, the Secretary of Defense does not have Presidential privilege, only by virtue of the President himself exercising it would the Secretary of Defense be able to assert it.

Mr. WHITE. Correct.

Mr. ERLENBORN. So I think we could do this by passing a law that would clarify that no one other than the President could assert the privilege.

Mr. BISHOP. In that connection, Mr. Erlenborn, I have a little bit of judicial precedent because Felix Frankfurter said in a case called, if I remember right, Touhy against Ragen, that he assumed that congressional process could reach the Attorney General, as distinct from the President. And since Frankfurter was not a man who talked lightly, I think he probably had good reason for believing that to be true.

Mr. PHILLIPS. Mr. Chairman, I wonder if I could comment on Mr. Erlenborn's question? I think is a very important one and it hasn't been raised specifically earlier in the day.

In preparing for these hearings we carefully analyzed the wording of President Nixon's memorandum of March 24, 1969, governing compliance with requests from Congress and ground rules for the invocation of Executive privilege. We also analyzed correspondence from the Secretary of Defense refusing the requests of other congressional committees for certain documents that have been mentioned here today.

The wording of these letters of refusal from Secretary Laird to the committee chairman used the term "privileged executive document" or "privileged executive matters."

Now clearly the procedures of the President's memorandum were not followed. And I don't believe that the Secretary of Defense would claim that he was invoking executive privilege himself. But the fact is, these documents were not made available on proper request from Congress. The terminology, "privileged executive document," is so close to the term "executive privilege"—which only the President can invoke under the memorandum that he issued—that this seemed to be inconsistent and perhaps even a subterfuge to justify the refusal to make this information available to Congress.

Mr. ERLENBORN. Would you clarify, when you say "request," whether it was a request or subpena? Because I would think if it was merely a request, the Secretary of Defense or anyone else could refuse on any grounds, or without grounds.

Mr. PHILLIPS. It was not a subpena.

Mr. ERLENBORN. In other words, if I request you to do something, you can say no without giving me a reason or asserting any reason you might want.

Mr. PHILLIPS. There was not a subpena involved.

Mr. ERLENBORN. I think that is the only point at which the executive privilege needs to be exercised. Up to that point, when it is only a request, it can be refused for any reason.

Mr. WHITE. In my view this is a little of that gamesmanship that goes on. I have a hunch that the fellow who transposed those two words thought he had come up with a cute one and he probably did. Without having read the documents, without knowing the parties involved, I will venture a guess that that is what happened.

Mr. BISHOP. It has the smell of deliberate ambiguity about it.

Mr. PHILLIPS. Thank you.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. I would like to briefly continue this dialog with both members of the panel on executive privilege if I might.

Do you think it is conceivable that a grave constitutional crisis could develop in the United States if the President exercised the so-called executive privilege doctrine in denying documents to Congress and then the Congress retaliated by refusing to authorize and appropriate funds for certain governmental activities?

Mr. BISHOP. It is certainly conceivable, but in the light of history, I would say it is probably unlikely.

Mr. CORNISH. In your opinion what would happen if such a crisis or showdown really did develop? Despite its unlikelihood?

Mr. BISHOP. I guess the short answer is I don't know. You would have a sort of Mexican standoff. Obviously, in the last analysis, Congress can by withholding funds put the President in an awful spot. But it does so, of course, at the risk of destroying a lot of things besides the President.

Mr. WHITE. Of course there is always that very big weapon, impeachment. It is not very helpful and constructive in most instances, but at least the framers of the Constitution contemplated there might be some crisis in which the Congress couldn't abide the electorate's choice of a President or the electoral college's choice of a President.

You are talking about some pretty hypothetical things and I hope unrealistic questions.

Mr. CORNISH. I would agree that these situations might be unlikely, but I think you would agree that they are not impossible situations.

Mr. BISHOP. I could give perhaps one sort of converse analogy. In 1916 Woodrow Wilson was so incensed at a clause in the Army Reorganization Act of that year, which was also the Army Appropriation Act, which was a pretty essential piece of legislation. Congress had omitted a rather esoteric type of court-martial jurisdiction which Wilson thought was an encroachment on his prerogative as Commander-in-Chief, and he vetoed the whole bill. So then Congress was in the spot of either having to have no Army appropriation bill, or passing one which removed the clause which Wilson objected to.

Mr. CORNISH. In that case, the ball bounced back.

Mr. BISHOP. It bounced back to Congress and Congress passed the statute without the objectionable clause.

Mr. WHITE. I believe President Johnson vetoed a military appropriations bill, too. And it was harmonzied at the last moment.

Mr. CORNISH. Of course, this would depend on the circumstances and the emotions and the what-have-you at the moment. But would you agree that in certain situations the exercise of executive privilege by

the President could be a potential dangerous threat to our system of government?

Mr. WHITE. Sure.

Mr. BISHOP. I can imagine them, yes.

Mr. CORNISH. Do you think there is anything that can be done in a practical manner which might avoid or avert such a possible future crisis, in the likelihood that these circumstances came about?

Mr. WHITE. The first thing to do is elect the right man President, of course. I don't see, even though I think the potential is always there, I just don't see it coming and prefer not to tinker around with it myself until I see that there is a clear and present danger. I believe that the Congress and the executive have demonstrated their ability to come into some pretty sharp confrontations, and ultimately work things out, maybe not to everyone's satisfaction, maybe not as well as they should have been worked out, but I don't truly foresee a constitutional crisis in the sense where we are immobilized and cannot act. I think the greater problem is what might be called the distrust or the unease of the people in this country in terms of the way our governmental processes are operating.

Mr. CORNISH. I think I have noted—and correct me if I am wrong—but throughout the entire thread of the testimony today, whenever we have gotten near this business of confrontation on the issue of executive privilege between the Congress and the executive branch, everybody has said, well, this is the type of confrontation that we want to avoid, and I almost get the feeling that we don't want to even discuss it, because of its tremendous ramifications if it did really develop.

Mr. WHITE. Well, that may be the impression that you gained, but as far as I am concerned, I don't have any problem about saying that weighing all of the pluses and minuses, it is easy for me to believe that the executive privilege doctrine or concept, especially as narrowed by the voluntary decision on the part of the past three Presidents, makes me think it ought to be retained. I am not prepared to suggest that it ought to be abolished or abandoned. So if you are looking for what my answer is, that is what it is.

Certainly, we would hope that the confrontations can continue to take place, but in the fashion that is not ruinous to the Nation and doesn't grind the governmental process to a halt.

Mr. PHILLIPS. I would just make this observation. We have such a confrontation situation now as has been described here. It may involve even a constitutional crisis; we have perhaps reached that point. But one of the great strengths of our system is that the political process can move in and try to resolve it. And this is one of the reasons that we have seldom been faced with this kind of a situation. I hope that our political structure will always be viable enough to be able to move into the breach when such a confrontation occurs and to resolve that crisis by a give-and-take operation within our political framework.

Mr. WHITE. There was the reverse of it when the executive branch began to believe that the legislative was encroaching on its prerogatives by delegating to committees or to subcommittees or subcommittee chairmen some of the, of what the executive thought were its responsibilities to discharge its laws, the approving of water projects, for example, and others. Of course, it then felt abused and raised the issue and there was a confrontation. I don't recall exactly how all of them

worked out. I think some were different from others. It was a case of, I think, men with absolute sincerity and good intentions just simply disagreeing about the way the system ought to work. We lived through those.

Mr. CORNISH. I wonder if I might just turn to a little different aspect of this, and that is, in your view, should the President also have the power to exercise executive privilege in dealing with the Federal judiciary?

Mr. BISHOP. You mean to refuse to give the courts information?

Mr. CORNISH. That is correct.

Mr. BISHOP. Well, what happens in that case, the courts have their method, too, of putting the heat on the Government. No. 1, in a criminal case, if the United States refuses to produce a document, even a privileged document, the court will simply dismiss the indictment. In other words, they play a sort of truth or consequences. In civil cases, at least where the Government is the plaintiff, the court will say, "If you don't produce this document, we will find against the Government on the issue to which the document is said to relate." There has never been yet a case in which a court has attempted actually to compel the executive branch to produce a document.

Mr. CORNISH. That is an interesting answer. I wonder if you would care to express an opinion as to whether, in your view, that would be the proper administration of justice?

Mr. BISHOP. I think it is a reasonable rule. Now, it seems to me that in strict constitutional theory, the problem of whether the judiciary can compel the production of a document is not different from the problem of whether the Congress can compel the production. It just hasn't actually arisen, because there has never yet been a case in which the judiciary had a compelling reason to demand the actual production of a document. They could do what they think and what I guess I would have to say I regard as substantial justice without compelling the Government to bring it into court.

Mr. CORNISH. The exchange of letters between the last three Presidents, and the chairman of this subcommittee have all dealt with executive privilege in relation to Congress solely.

Mr. BISHOP. Yes, I believe that is true.

Mr. CORNISH. I wanted to get some view on the judiciary expressed in this hearing today. Thank you, Mr. Chairman.

Mr. MOORHEAD. When we have had the question of national defense and clear and present danger to the country, the instinctive reaction from the witnesses was that it is all right for the executive to practice secrecy, possibly even deception. While I wouldn't say we should change the laws, maybe we should change the attitude of the executive. I think back to a very serious condition that existed when you were in the White House, Mr. White, and I refer to the Cuban missile crisis. It is true that crisis was kept secret. It was known for a matter of days—I can't remember how many days. But then the President did go directly to the American people on television and described the situation. I think he probably showed photographs that had been up to 5 minutes earlier classified top secret. The Congress was not in session, but quite a number of us came back to Washington and very full and adequate briefings were given to us. We were given access to what were then classified top secret documents, although most of

them appeared in the newspapers in a day or two. But there was a full and frank exchange, (a) with the Congress, and (b) with the people.

I think if we could get the message to the executive that oftentimes secrecy is not in the best interest, particularly when it is keeping things secret from the American people which are probably better known by the enemy than they are known by the American people, then I think, in my judgment, the Government will work better and democracy will work better.

If there are no further comments or questions, the——

Mr. CORNISH. Mr. Chairman, this morning we asked Justice Goldberg if he would be willing to answer some questions in writing. I wonder if these two gentlemen would also agree to such an understanding?

Mr. BISHOP. Certainly. Yes.

Mr. WHITE. Yes. We will do the best we can.

Mr. MOORHEAD. Thank you both very much. We have kept you a long, long time. I apologize for that, but you have been most helpful to this subcommittee, and we deeply appreciate it.

The subcommittee stands adjourned until 10 o'clock tomorrow morning in room 2128 of the Rayburn House Office Building.

(Whereupon, at 5:15 p.m., the hearing was adjourned, to reconvene at 10 a.m., Thursday, June 24, 1971.)

U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—THE PENTAGON PAPERS (Part 1)

THURSDAY, JUNE 24, 1971

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2129, Rayburn House Office Building. Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: William S. Moorhead, John E. Moss, John Conyers, Jr., Bill Alexander, Ogden R. Reid, Frank Horton, John N. Erlenborn, and Paul N. McCloskey, Jr.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; William R. Maloni, professional staff member; and William H. Cophenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

At yesterday's hearing there was discussion about the so-called Vietnam documents and the jurisdiction of this subcommittee. As a result of the discussion I spoke to the chairman of the full committee, and subsequently to the Speaker of the House. The Speaker said he could not, under the House rules, refer the documents to a subcommittee.

Subsequently the chairman of the full committee met with Speaker Albert this morning and the Speaker said he had not yet received the documents. He stated further that the Parliamentarian recommended that the documents be referred to the Armed Services Committee for study, but that every Member of the House will have access to the documents.

I intend to speak to the Speaker again on this subject and at the luncheon recess the subcommittee will go into executive session and discuss the matter further.

Our first witness was to be the gentleman from California, Mr. McCloskey. But I understand Mr. McCloskey would like to defer his testimony. I yield to the gentleman from California.

Mr. MCCLOSKEY. Mr. Chairman, I was prepared to testify this morning on some 600 or 700 pages of documents which purport to be related to this study. I would respectfully like the privilege to compare the documents I have against the documents that are being furnished to the House before testifying.

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I understand from Chairman Hébert of the Armed Services Committee that those documents will be available for inspection to any Member of the House who wants to go into the committee room and review the documents in the committee room, without making copies or removing them from the room.

I think it will diminish the time required for my testimony if I am able to do that before presenting these matters to the subcommittee.

Mr. CONYERS. Mr. Chairman, can we get an understanding of when all of this is going to happen? We had a motion that consumed approximately an hour of this subcommittee's time yesterday and apparently we have gotten no further ahead than we were yesterday afternoon.

We do not know on what basis the Speaker is going to make this ruling. I would like to know the parliamentary basis for his ruling. We don't know when the documents are going to be made available. Can we get a clarification of this one way or the other?

Mr. REID. If the gentleman would yield, it would be my hope that Mr. Moss and I, in concert with other members of the committee, will be able to examine this question at lunch and come back with an appropriate motion to maintain our proper jurisdictional interest in this whole question with access to the documents. We will so attempt to do and have a motion brought before the committee right after lunch.

Mr. MOORHEAD. The chairman of the full committee said that he was very interested in this matter and that he would have been here as an ex officio member if he did not have another meeting of his Joint Atomic Energy Commission Committee. Because of the death of a close associate, he has to be in California this afternoon.

Mr. Horton?

Mr. HORTON. Mr. Chairman, as I understood your statement, we were going to have an executive session after the hearing this morning at which time the subcommittee would discuss the matter of the motion.

As I understand Mr. Reid's statement, he indicated he and Mr. Moss and perhaps you were going to be meeting and talking with the committee again at some future time.

Mr. REID. No. If I can clarify what I said, my thought is that Chairman Moss and I discuss it with members of the committee——

Mr. MOORHEAD. Let me state one thing to the gentleman from New York. The chairman of this committee is the gentleman from Pennsylvania, and if there is going to be any negotiating, the chairman of the subcommittee will do it with those members of the subcommittee I want to have with me. So I think we can discuss this better at the executive session at the luncheon recess and determine what the proper procedure will be.

Mr. HORTON. Do I understand we will have an executive session at 12 o'clock? Can we set a time and then ask the staff to get in touch with the other members of the subcommittee who are not here so they can have an opportunity to be informed?

Mr. MOORHEAD. We will do that.

In view of Mr. McCloskey's statement, our first witness today will be Mr. William G. Florence, a retired civilian security classification policy expert.

Mr. Florence served for 43 years in military and civilian capacities for our Government and assisted in the policy preparation of Execu-

tive Order 10501 and implementing directives. He retired from the Government just a little over 3 weeks ago after serving for some 4 years in the Pentagon as a Deputy Assistant for Security and Trade Affairs for the Deputy Chief of Staff for Research and Development and the Deputy Chief of Staff for Systems and Logistics, Headquarters, U.S. Air Force.

Mr. Florence, will you rise and raise your right hand?

(Witness sworn.)

Mr. MOORHEAD. Mr. Florence, you may proceed.

STATEMENT OF WILLIAM G. FLORENCE, RETIRED CIVILIAN SECURITY CLASSIFICATION POLICY EXPERT

Mr. FLORENCE. Mr. Chairman, I am truly honored to have been invited here. I am deeply grateful for this opportunity to participate in the exploration of perhaps the most serious constitutional question that has arisen in my lifetime: The question whether we shall continue to enjoy the freedom of speech.

I am familiar with the work this subcommittee has accomplished over the past 16 years, including the landmark legislation known as the Freedom of Information Act. I believe the time has come for another service of perhaps equal, maybe even greater importance.

It is my purpose to furnish facts that could be useful to the subcommittee in reviewing practices of the Department of Defense involving the evaluation, classification, dissemination, and declassification of information under Executive Order 10501, November 5, 1953, entitled "Safeguarding Official Information in the Interests of the Defense of the United States," as amended by Executive Order 10816, May 7, 1959, and Executive Order 10964, September 20, 1961.

I also wish to offer suggestions for eliminating unrealistic restrictions which currently are applied by the Department of Defense, in the name of national security, against the disclosure of information to the public regarding Government business.

During my 43 years of military and civilian service with the Government, which ended by retirement May 31, 1971, I worked in many positions involving responsibility for safeguarding defense information.

At Headquarters, U.S. Air Force, I exercised responsiblity from 1945 until 1960 for developing and publishing Air Force policy and procedures for evaluating, classifying, safeguarding, and declassifying defense information. This included writing the basic policy in Air Force Regulation 205–1, subject: safeguarding classified information.

During the period 1945–60 I also served on committees within the Department of Defense and on interdepartmental groups concerned with developing or revising policy for safeguarding defense information within the United States and international organizations such as NATO.

This included contributing to the preparation of policy in Executive Order 10501, which was originally promulgated as Executive Order 10290, and to the preparation of implementing directives issued by the Department of Defense.

I was the author of DOD Directive 5200.9, September 27, 1958, subject: Declassification and Downgrading of Certain Information Originated Before January 1, 1946.

I also initiated the proposal that a policy be established for automatic downgrading and declassification of information on a very accelerated time-phase basis. (Eventually, a policy for automatic declassification was published in DOD Directive 5200.10 and was incorporated in Executive Order 10501 by Executive Order 10964.) It is not a very accelerated time-phase system.

From May 1960 to July 1967 I occupied positions in the Air Force Systems Command involving responsibility for assuring the protection of classified defense information released to or developed by contractors.

In August 1967 I returned to Headquarters, U.S. Air Force, where I served until May 31, 1971, as Deputy Assistant for Security and Trade Affairs for both the Deputy Chief of Staff, Research and Development, and the Deputy Chief of Staff, Systems and Logistics.

I exercised responsibility for (1) technical program security requirements in general, (2) classifying and declassifying research and development information and weapon systems, (3) reviewing proposals for public release of technical information, and (4) developing the Air Force position regarding proposals from industry to export technical information and munitions of war.

Based on knowledge and experience gained before and since promulgation in 1951 of the first Executive order for safeguarding official information I submit that Executive Order 10501 should be rescinded.

The basic classification system and safeguarding procedures in the order were originally designed for the very narrow field of military information.

The limited scope of military planning, operations, and logistical support activities before World War II permitted the effective application of policy by the Army and Navy for designating and protecting certain items of information against disclosure outside military and naval channels. It is my understanding that military security regulations of the type that existed up to the conclusion of World War II are not at issue here. The President is specifically authorized to "make rules for the Government and regulation of the land and naval forces."

Beginning with World War II, however, responsibility for national defense planning, implementation of defense planning, logistical support operations, and the coordination of actual military operations necessarily mushroomed far beyond the limits of military channels. Numerous civilian departments and independent agencies became involved. Requirements for disseminating pertinent information expanded proportionately.

As I recall the facts, a Security Advisory Board operated in World War II to assist in coordinating security procedures among the various Government agencies requiring knowledge and custody of military information which had been assigned a security classification by one of the military departments.

Memorandums issued by the Board established standards of protection to be applied by all agencies in the interest of uniformity. However, adherence to the standards was voluntary on the part of each agency. Therefore, the Board developed a draft Executive order for

the purpose of having the security standards made directive upon all activities and all information of the executive branch.

Notwithstanding the advice of many individuals against expanding the policy for classifying military information to cover all activities and information of the executive branch, the draft order was completed and promulgated September 24, 1951, as Executive Order 10290.

Within a short time after issuance I could see that dissemination of classification policy by Executive action had led to a more widespread use of classification markings than existed before the order. Regardless of such restrictions as my superiors permitted me to include in Air Force regulations regarding the use of classification categories, overclassification increased.

The classification and withholding of information from the public under Executive Order 10290 had become a political issue by the time the newly elected President took office in 1953, just 2 years later. The policy was quickly redrafted by the new administration in an effort to reduce its scope. It was republished November 5, 1953, as Executive Order 10501.

The major improvement was to stop the misuse of the restricted classification category. This was done very simply and most effectively by eliminating the category from the classification system. We had no more trouble with that classification.

For about 2 years there actually was some reduction in the use of security classifications in the Department of Defense. But by 1955 the various types of actions taken by the Department of Defense in implementing Executive Order 10501 had permitted and encouraged the overclassification of information to begin increasing again.

Since then the practice has become so widespread that the defense classification system is literally clogged with material bearing classification markings. I would guess that there are at least 20 million classified documents, including reproduced copies, in existence today.

I sincerely believe that less than one-half of 1 percent of the different documents which bear currently assigned classification markings actually contain information qualifying even for the lowest defense classification under Executive Order 10501. In other words, the disclosure of information in at least 99½ percent of those classified documents could not be prejudicial to the defense interests of the Nation.

Numerous individuals in the Department of Defense, including myself, have attempted to the best of our ability to limit the use of defense classifications to the purpose for which they were intended. Various officials from the Secretary of Defense down have initiated measures designed to restrict the use of defense classifications.

But hundreds of thousands of individuals at all echelons in the Department of Defense practice classification as a way of life. They came into military service or civilian employment under the policy in Executive Order 10501 which permits the classification of information, and they simply are not going to change their practice as long as the classification system exists.

Let me tell you about the early indoctrination by the Air Force for its inductees at Lackland Air Force Base, for example: These individuals are immediately advised that there must be this broad safeguarding of military information. Each individual participates in determining what information should be safeguarded.

Not only is this indoctrination given before the individual is even acquainted with the service, there is the complication of another virtually fourth security classification injected into the indoctrination. The Air Force uses the term "unclassified sensitive" to designate information which technically does not qualify for a marking as classified defense information under the Executive order, but the effect is substantially the same as putting a security classification on that information. It makes it so that information not qualifying under the Executive order for the marking of confidential becomes confidential anyway in the minds of these inductees, and that idea extends on through their service. My point, Mr. Chairman, is that there is quite a dilution of the intent and language of the Executive order.

Here are some additional facts regarding the classification philosophy of the Department of Defense which I believe are quite pertinent to the subcommittee review.

1. DOD Instruction 5210.47, covering the classification system of the Government and its application by the Department of Defense limits original classification authority in the Department of Defense to a relatively few individuals.

However, the same directive delegates something called derivative classification authority to any individual who can sign a document or who is in charge of doing something.

Such individual may assign a classification to the information involved if he believes it to be so much as closely related to some other information that bears a classification. This is called derivative classification authority.

In the past several years I have not heard one person in the Department of Defense say that he had no authority to classify information. The restrictions in Executive Order 10501 on delegating authority to classify have virtually no effect.

Incidentally, it might be recalled that some of the complexities in the Government's affidavit regarding DOD classification practices which were submitted to the district court in the Washington Post case included references to derivative classifications.

2. The majority of people with whom I worked in the past few years reflected the belief that information is born classified and that declassification would be permitted only if someone could show that the information would not be of interest to a foreign nation.

As one of many examples, I have received correspondence from the Air Force Systems Command objecting to possible declassification of items of information unless it could be proved to them that declassification would actually benefit the Air Force.

More recently, I attempted to obtain concurrence of an air staff office in declassifying the external view of fire control equipment being sold to Japan for use on the Japanese F–4 aircraft.

In addition to other reasons for declassification that I was sponsoring, more than 12 of these sets had been lost in foreign territory. But I was told that concurrence could not be given until there is positive proof that possible enemy countries have had access to this system. Fortunately I was successful in getting that office overruled. The classification requirements on that information was canceled.

3. Nearly everyone known to me follows criteria for classifying information which are much broader than the criteria in Executive

Order 10501. This stems primarily from inadequate limitations in DOD directives, including DOD Instruction 5210.47.

The Office of the Secretary of Defense provides for and encourages the use of lists of examples of information which could qualify for classification. Lists include such generalities as "state-of-the-art," "breakthroughs," "new thresholds," "production schedules," "manufacturing data," "performance," and so forth.

As a matter of fact, Air Force Regulation 205–29, as published by the Air Force Inspector General, negates the criteria in Executive Order 10501 in some degree by providing for the classification of scientific or technological information if the information would aid a foreign government.

I was asked recently by the Office of the Secretary of Defense to concur in a proposal to classify all rocket propulsion information that is not presently in open literature. This, of course, is not a criterion or an approach to the reasons for imposing security restrictions on information that is established in the President's order.

Another point is that people, all of us really, want a simple list to file and glance at, containing instructions about information qualifying for a classification. This is all they will use for assigning classification markings if you give it to them. Thus, instead of judgment classification, we get file drawer classification.

The Department of Defense simply does not make clear the fact that no item of information, regardless of type, can qualify for a defense classification under Executive Order 10501 unless proper authority determines that its unauthorized disclosure actually could be prejudicial to the defense interests of the Nation.

4. It is common practice in various Department of Defense activities to assign a defense classification to documents known by the classifier to contain no item of information qualifying for a classification. The reason usually is that the mere association of items of unclassified information warrants security protection and the classification designation.

The individuals involved evidently are not aware of the fact that information truly qualifying for classification cannot be divided into separate unclassified elements. In other words, according to sections 1 and 3 of Executive Order 10501, zero classification plus zero classification can never become confidential. There must always be an additional ingredient warranting that classification.

Let me cite some actions that show how utterly ridiculous the theory of association classification can be in practice. These are not very exceptional. They are quite common.

(*a*) Some time ago, one of the service Chiefs of Staff wrote a note to the other Chiefs of Staff stating briefly that too many papers were being circulated with the top secret classification. He suggested that use of the classification should be reduced. Believe it or not, Mr. Chairman, that note itself was marked "top secret."

(*b*) The Air Force Electronics Systems Division at Hanscom Field, Mass., adopted the following statement for use on selected documents: "Although the material in this publication is unclassified, it is assigned an overall classification of confidential." We attempted some extra orientation in the Air Force regarding the definition of "confidential" at that time. I would not say our immediate success lasted very long. I still see practices of this sort.

(*c*) Not so very long ago, someone in the Navy Department placed the "secret" marking on some newspaper items of particular interest to the Navy. Subsequently, that action caused some embarrassment to the Department of Defense. As a result, a special directive had to be published to tell people not to classify newspapers. I see recently that practice within the Department of Defense is continuing anyway, the best I can tell from reading the newspapers today about the disclosures in the New York Times, the Washington Post, and the Boston Globe.

(*d*) Last year, the Rand Corp. produced a document containing unclassified lists of electronic equipment, including electronic warfare equipment, that is carried on U.S. Air Force aircraft. This was not like the 47-volume document that is so much in the news today. No classified information was used as source material. Nothing was added by the author that could possibly have qualified for protection under Executive Order 10501. For example, here is a portion of the material that was used. It even specifies here on each page that it is unclassified.

However, in the course of a routine review of the Rand listings within the Department of Defense, one Air Staff office wrote the following: "In our judgment the document should be classified at the confidential level since it reveals actual electronic warfare configurations of USAF aircraft." Without regard to comments from other offices that the document did not contain classified information, the Department of Defense notified Rand Corp. that the confidential classification should be applied. At the time I retired, my office had not been able to have that classification canceled. You might note, Mr. Chairman, the total absence of any thought, really, as to whether republication of that unclassified information would prejudice our defense interests.

Mr. Chairman, I refer again to the Government affidavit that was filed in the Washington Post case. That affidavit relating to the use of security classifications and explaining the Executive Order, 10501, clearly supported the use of association classifications in the Department of Defense, such as the foregoing example.

5. A great many individuals in the Department of Defense, including highly placed officials, classify or strongly support the imposition of defense classifications on privately owned information, including privately generated applications for patents, regardless of the fact that Executive Order 10501 is clearly limited to official Government information. This really spreads classification beyond any possible control. And we can be certain that the tremendous costs which stem from this type of unnecessary classification, as well as all other unnecessary classifications, are charged to all of us as taxpayers.

I could cite numerous recent or current cases involving the assignment of classifications to privately owned information. Here is one example. Nearly 2 years ago, a west coast firm published as unclassified a document describing their privately developed electronic system for air surveillance of missile sites. After considerable effort in obtaining a Government license for export, the company distributed the document last year, as unclassified, to numerous foreign countries. Of course, it had wide distribution in this country. Late in 1970, the Army came into possession of the company's information. In December, the Army sent a letter to the Defense Supply Agency in Los Angeles advising that the information required the classification "Secret-Noforn." Mr. Chairman, "Noforn" is an acronym for "no foreign

dissemination." The Defense Supply Agency was to conduct an inquiry into the purported "security violation." Incidentally, the Army letter itself contained information marked as confidential.

Subsequently, a report of investigation was forwarded to the Department of Defense for action. In March, this year, my own office submitted comments showing that no Government classification should apply. Included in our letter was the following:

> The fact that a Government activity classifies its own use or knowledge of an officially developed item of information does not constitute any legal basis for attempting to classify and restrict a commercial firm's use or knowledge of its privately developed information, even though both items of information might seem to be identical.

Nevertheless, the proclassification position prevailed and the Department of Defense later notified the company that the information was still considered to be classified. I do not know whether this matter has been resolved yet.

6. Here is another very serious problem. Many people hold the view that the classification system can and should apply to information in the public domain. This includes the top security policy office in the Department of Defense. And, of course, that view is reflected at this moment by the Government's proposal to review the New York Times papers of June 13, 14, and 15 and make a decision within 90 days, maybe less, as to whether the top secret classification may be downgraded or canceled.

Let me give you some other examples of cases that are common throughout the Department of Defense:

(*a*) When the Secretary of Defense presented his statement to the House Armed Services Committee March 9, 1971, on the 1972–76 Defense program and the 1972 Defense budget, one of our Air Staff Divisions rose up in wrath about the disclosures made by the Secretary. Here is an extract of the report made by the Secretary of Defense to the House Armed Services Committee.

Mr. Moorhead. Mr. Florence, do you want that extract to be made a part of the record?

Mr. Florence. I had not intended to, sir. I don't believe it is quite that complete to be self-explanatory.

Mr. Moorhead. Thank you. You may proceed.

Mr. Florence. By the way, Mr. Chairman, in all of this critical review of the Department of Defense, I submit that it does about as much good as anyone could hope for when it comes to releasing information to the public regarding Defense planning. The public release machinery works very effectively, in my opinion, in spite of the weird confusion that exists in the classification system. I believe, sir, that this Department of Defense presentation of March 9, 1971, is a very good example of what I am talking about.

The Division in the Air Staff I am referring to issued a statement of its own that same day, March 9. It developed a list of elements of information, including some that had been published by the Secretary of Defense. The Division then assigned its own classification to those elements of information and sent the list to officials in the Offices of the Secretaries of Defense and the Air Force, the Air Staff, and the Air Force Systems Command. In requesting comments about the Division's own security classification assignments, the covering letter

included the statement, "please disregard what you know has been released or compromised."

This was another matter that had not been resolved when I retired last month.

(*b*) Here is another very significant case. Two years ago, the Assistant Secretary of the Air Force for Research and Development advised a subcommittee of the House of Representatives Appropriations Committee regarding:

> The formulation of a concept which involves the capability of the 949 satellite system to both detect missile launches off the launch pad, and forecast their trajectory and combine those data with long wavelength (LWIR) midcourse tracking.

This is somewhat of a technical description, Mr. Chairman, but I beg your indulgence. There were some other excellent disclosures but let us consider this performance function of the program 949 satellite.

After that public disclosure, my Office certainly anticipated being able to issue instructions that would have canceled the existing secret classification specified in Air Force documents regarding the fact that program 949 had any sort of missile detection capability. But, again believe it or not, we could not obtain concurrence of people in the Office of the Undersecretary of the Air Force to cancel the classification. In the past 2 years, the Commander of the Air Force Space and Missile Systems Organization, the Commander, Air Force Systems Command, and some other individuals have attempted to obtain authority for canceling the classification on the general purpose of program 949. A great deal of information is published periodically in the newspapers about this program. Very little so-called leakage of information, however, has occurred. The program simply is self-revealing to anyone who is interested.

But the philosophy in certain offices in the Department of Defense that nearly everything about space programs must carry a defense classification, regardless of exposure, continues to prevail regarding program 949 and some other space programs. Incidentally, the DOD directive concerning the classification of space programs was assigned the secret classification when it was issued about 10 years ago. It still had that marking last month.

7. My next case shows how deeply embedded and inflexible the "born classified" concept has become.

In April of 1970, the Director of Defense Research and Engineering—Dr. Foster—proposed to make substantial changes in DOD policy with a view toward actually eliminating overclassification and unnecessary classification of research and development information. It was his conclusion that such information as might require classification could not, as a general rule, be protected for more than 2 years. At the end of that period, the information was to be declassified, with very few exceptions. Also, he proposed that any item qualifying for classification be marked and handled as secret—not confidential, but secret—so that it might be effectively accounted for and protected during the 2-year classification period.

This proposal for automatic declassification of research and development information after 2 years, and the other highly constructive proposed improvements in policy, were beaten down by objections from the proclassification people in the Department. It seemed that too

many people would have lost some of their classification prerogatives. I personally thought that Dr. Foster should have been awarded the highest of honors for the proposals he made.

It really was, and still is, a disappointment that since the date of my blanket declassification action in 1958, the proclassification people can stymie any effort within the Department of Defense that would make the classification system fully workable.

8. The next problem regarding the application of Executive Order 10501 is the total lack of incentive in the Department of Defense for proper classification. An individual who strives to limit the use of defense classifications to information for which they are authorized in the order runs a risk of being accused of and punished for a security violation.

To my knowledge, no one in the Department of Defense was ever disciplined for classifying information, regardless of how much the classification cost for unnecessary security protection or what damage resulted from the restriction against releasing the information to the public. But I have seen how rough a person can be treated for leaving classification markings off of information which he knows to be officially unclassified if someone "up the line" thinks that a classification should have been applied.

Mr. Chairman, the foregoing comments reflect the reasons why I have concluded that promulgation of Executive Order 10290 and its reissuance of Executive Order 10501 was a mistake. We can make honest mistakes. I do believe that this was a mistake. We should never have been encumbered with a policy permitting an individual to impose, by administrative action and personal choice, any restriction on the dissemination of information to which the people of this country are clearly entitled by the Constitution.

I respectfully submit it is my belief that any effort to revise the Executive order and to require the type of implementing action that might truly serve the interests of the country would be doomed to failure. The fallibility of men and the self-interest we necessarily exercise in our lives simply rule out any hope that administrative choices made as to classification under a new order would be better for the Nation than those being made today. We could easily amend the existing order, but we cannot amend people.

We did not need the broad policy that is in Executive Order 10501 to assure the protection of truly sensitive military information before 1951. Our defense interests could be served better without such a policy.

I respectfully suggest the enactment of legislation for controlling "defense information" or "defense data" similar to that which covers "restricted data" under the Atomic Energy Act of 1954. The Congress could decide upon appropriate language, sufficiently precise, that would include only those elements of military information which warrant and must be accorded effective protection against disclosure. The use of so-called classifications or other similar labels should be avoided. Any proposed disclosure not authorized by the statute could be stopped, and any unlawful disclosure could be the basis for penalty. The degree of punishment should be made commensurate with the seriousness of the violation, not necessarily a severe penalty.

Mr. Chairman, I again express my deepest thanks for the invitation to come before the committee and present these facts and suggestions.

Mr. MOORHEAD. Thank you, Mr. Florence.

I have been requested to ask the members that when they interrogate the witness to stay close to the microphone. There seems to be some difficulty in picking up our discussions.

We thank you, Mr. Florence.

Mr. Florence, during your long service in the Defense Establishment I am sure that you have evaluated literally thousands and thousands of classified documents in all categories from the old "restricted" label to "top secret." I think your credentials establish you as a bona fide security classification policy expert of longstanding and high regard. In addition, you have just recently ended your service at the Pentagon through retirement.

In your informed judgment and long experience, I wonder if you would repeat just how much defense material, percentagewise, you feel needs to be classified and kept from the American people. I ask you this so there will be no misunderstanding about it, and so your answer will be absolutely clear.

Mr. FLORENCE. Mr. Chairman, using what I believe would be the understandable relationship of one percentage as opposed to another, I repeat what I have already included in my remarks, that perhaps one-half of 1 percent, volumewise, would even come within the remotest conception of Executive Order 10501.

Mr. MOORHEAD. So your testimony is that our batch of classified documents is just the opposite of Ivory Soap. It is 99.5 percent impure or improper?

Mr. FLORENCE. Yes, sir.,

Mr. MOORHEAD. I think it is shocking that we have this waste and unnecessary classification. It is a most serious indictment of the blatant unnecessary secrecy in Government.

Mr. Florence, how many people in the Government are engaged in classifying documents? Or, if you only know the Defense Department, if you want to tell us how many people in the Defense Establishment classify documents.

Mr. FLORENCE. I will answer that, sir, with a general statement, or I could reach here and get the Department of Defense directive that describes it, and then we would have to use some sort of computer to go from there.

Mr. MOORHEAD. Can you give us a reasonably accurate estimate of how many people classify documents in the Defense Establishment?

Mr. FLORENCE. Let me give an estimate of several hundred individuals in highly placed positions who can assign the top secret classification. I say several hundred, maybe it is only 300. But suppose it is more or less, at least that is a figure that any of us can visualize. These individuals operate with authority from the Secretary of Defense to assign original classifications.

Assuming that there are perhaps 300 or 400 throughout the Department of Defense authorized to assign original top secret classifications, this has absolutely no effect on the assigning of classifications, Mr. Chairman. The statement I made in my comments refers to the actual practical facts.

The derivative classification practice is the serious problem in the Government today. Under this concept of derivative authority to classify, anyone can assign classifications, sir. Anyone. I used the statement, I believe, "hundreds of thousands" in my comments.

Mr. MOORHEAD. So your testimony is that either through the direct authority or through this derivative authority there are hundreds of thousands of people in the Defense Establishment who can classify documents?

Mr. FLORENCE. Absolutely, sir.

Mr. MOORHEAD. Mr. Florence, would you say that there is an element of ego involved in working on a project labeled say top secret as opposed to one labeled secret or confidential or unclassified?

Mr. FLORENCE. Yes; Mr. Chairman, I do.

I will qualify that in this respect: It depends upon the two or more individuals who may be communicating on such a matter. In such communications, which I personally have heard, a point will be made by an individual that his particular agency handles top secret information.

I do wish to say that this is not a great standard for thinking people in the Department of Defense. I do not believe that very many highly placed officials or even the lesser officials ever give it a thought. Top secret to them is just a way of indicating something either in speech or in writing, like putting a period after a sentence. It is just automatic.

Mr. MOORHEAD. Do you have any estimate as to the cost to the taxpayers from the unnecessary classification of 99.5 percent of the documents?

Mr. FLORENCE. Mr. Chairman, I could answer that in various ways. The question refers to many, many problems of cost. Narrowing the question down perhaps to storage of information, to actual day-to-day operations dealing with classified information, those things that would immediately come to the mind of the committee and others listening, and who will hear about this, my guess is we are spending perhaps $50 million a year extra in direct costs for unnecessary classification of information, aside from proper classification.

Mr. MOORHEAD. Thank you, Mr. Florence.

Mr. Reid?

Mr. REID. Thank you very much, Mr. Chairman.

Mr. Florence, I would like to thank you for a very precise and thoughtful testimony.

Might I ask you first whether you have read the three installments of the Pentagon papers as published in the New York Times or the elements that have been published in the Boston Globe or the Washington Post?

Mr. FLORENCE. Sir, I have only read considerably of the New York Times publications. But I have read all of the articles in the Washington Post.

Mr. REID. Would you care to comment as to, in general, with the understanding that you have not read it all, but of those things you have read, what degree of classification, if any, should originally have been given and what percentage of it, if you feel any of it is classifiable, should have had that label?

Mr. FLORENCE. Sir, I would like to divide the question into, first, the degree of classification that should have been given to the entire 47-volume report.

In my considered judgment the designation of that report and many, many items in it, as confidential would have been correct at the time of issuance.

I could expand upon why. I believe I will state that what I have in mind is that this was a compendium, this was a description, this was a history, this was not the action.

The actions had already been taken, so, therefore, there is no element of protecting actions. This was simply a matter of history.

To the extent that there was a continuity of actions stemming from the revelations at the time, I would say the confidential category as defined in the Executive order was entirely adequate, originally.

Mr. REID. Now, those portions that you think might have been susceptible to the minimum classification of confidential, what percentage, which is the second part of the question, would you guess should have had no classification whatsoever?

Mr. FLORENCE. At the time we are talking now, sir, of the original publication, organization, and publication of those papers——

Mr. REID. You can put it in the present date if you wish.

Mr. FLORENCE. This goes to the second part of your question, I believe, Mr. Congressman. At this time, and certainly for the past perhaps 2 years or so, speaking now from knowing what the system for assigning these defense classifications really stands for, there has been no basis for attempting to secure that information in the interest of the national defense for, I would say, at least 2 years.

Certainly at this time, as I have reviewed the information that has been published, none of it falls within the criteria of Executive Order 10501 as qualifying for protection in the interests of the national defense. None of it, sir.

Mr. REID. None of it qualifies for classification?

Mr. FLORENCE. No, none that I have read.

Mr. REID. I think your answer is very explicit on that point.

Let me next turn your attention to Executive Order 10501 and specifically to section 4 which states:

> When classified information or material no longer requires its present level of protection in the defense interest it shall be downgraded or declassified in order to preserve the effectiveness and integrity of the classification system and to eliminate classification of information or material which no longer require classification protection.

Might I ask, Mr. Florence, from your own experiences, were there many instances or any instances where top secret information was declassified consistent with section 4 or were there any active procedures to review this category of intelligence?

The reason I ask, of course, is that the lower categories have some automatic declassification procedures, whereas this area does not and could only be declassified in accordance with section 4.

Mr. FLORENCE. Mr. Congressman, I believe at the outset here that we should agree that the automatic downgrading procedures do apply to the top secret category.

Mr. REID. They do?

Mr. FLORENCE. Yes, sir. Under the automatic downgrading system there is a period of 3 years at which the top secret information may be retained in that category. I mean information marked top secret and right on down the line.

Mr. REID. Then if you put that requirement on it and make that point, how much top secret has been, in your experience, declassified either automatically, pursuant to the point you just made, or pursuant

to section 4, if it should have been declassified earlier than the 3-year period?

Mr. FLORENCE. What percentage, sir?

Mr. REID. Yes.

Mr. FLORENCE. Figures are precise and the use of a figure might be misinterpreted, but I am going to use one anyway. I might say perhaps 1 percent.

Mr. REID. So it is a rarity for a top secret document either automatically or as a result of review ever to be declassified in your experience?

Mr. FLORENCE. Under the system here; yes, sir.

May I add this, sir, that at any time the Department of Defense or any other department, for that matter, decides that it is in the best interests of the country for information contained in a document marked top secret to be made public, or to be used—and particularly this is the practice—to be used in working with the Congress, at that time the information will be used for whatever purpose is in mind regardless of that classification. It will be taken from the material marked top secret and used as unclassified to suit the purposes of the government.

So the category in itself does not preclude urgent government business from being accomplished. It is certainly an encumbrance, however, in the effective performance of the government business.

Mr. REID. Finally might I direct your attention to section 1 of the Executive order, the next to the last sentence thereof which reads—well, I will read the whole section:

> Official information which requires protection in the interest of national defense shall be limited to three categories of classification which in descending order of importance shall carry one of the following designations: Top secret, secret, or confidential. No other designation shall be used to classify defense information including military information as requiring protection in the interest of national defense except as expressly provided by statute.

My question is this: The material, some of the material that has been published in the Pentagon papers, I am told, has been labeled top secret-sensitive, which is an extra-legal classification and is not provided for by statute and is expressly prohibited by the Executive order here.

Have there been other instances to your knowledge where additional classifications contrary to the Executive order and the statute have been used for a variety of reasons?

Mr. FLORENCE. Mr. Congressman, let me answer that question this way: I believe there is a question of interpretation about what is and what is not authorized by the Executive order. The question of interpretation relates to whether or not the term "secret-sensitive," the term "secret-noforn," the term "secret-limited," actually constitute unauthorized classification designations.

They have the effect of being unauthorized additional classifications, but they can be supported against a charge of violation of the Executive order by saying that they only indicate the necessity for restrictions on dissemination within the procedures for the category involved.

For example, consider top secret-sensitive or confidential-noforn or secret-noforn. It could be shown in the final analysis that these additional markings are simply added indications of limited access.

Now, after having said all of this, the net effect, however, is that the words that you have referred to constitute additional security classifications in the minds of literally thousands of people.

Sir, I hope I have not, myself, confused the point. I am reflecting a confusion that you have raised in your question.

Mr. REID. No; I think, Mr. Florence, you have clarified it. Thank you very much.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Conyers.

Mr. CONYERS. No questions.

Mr. MOORHEAD. Mr. Horton?

Mr. HORTON. Thank you, Mr. Chairman.

Mr. Florence, you have indicated that you are a retired civilian security classification expert, and you have also indicated in your biographical résumé included in your statement that you served with the headquarters of the Air Force and you have indicated the periods. Were you ever on active duty? Were you an officer or did you have status as a military officer?

Mr. FLORENCE. I did, sir. I was in commission status from April 1942 until June 25, 1950, when I separated to enlist in the Air Force, and then retired June 30, 1951.

Mr. HORTON. What rank were you? Did you retire?

Mr. FLORENCE. Yes, sir. I had been in the U.S. Army, including the Army Air Forces, and had transferred to the U.S. Air Force.

Mr. HORTON. Did you retire as an officer in the Air Force?

Mr. FLORENCE. My actual status in retirement was enlisted, which at the time of retirement required a transition from my commission status to enlisted status for the time necessary to work out the retirement papers. This was the way in which I separated from the service. Later I was advanced on the retired list to the commissioned grade.

Mr. HORTON. What is that grade?

Mr. FLORENCE. Major, sir.

Mr. HORTON. So you are retired now at the major grade in the Air Force?

Mr. FLORENCE. From the Air Force; yes, sir.

Mr. HORTON. Then you have also retired from civilian service?

Mr. FLORENCE. Yes, sir.

Mr. HORTON. And that is the status which you enjoy at the present time?

Mr. FLORENCE. Yes, sir. I served from July 1, 1950, until this past month in civilian status and now have retired from that.

Mr. HORTON. When you were at headquarters Air Force in 1945, were you on duty there in your capacity as a military officer?

Mr. FLORENCE. I was, sir.

Mr. HORTON. Then when you retired in 1950, you continued to work at Air Force Headquarters as a civilian?

Mr. FLORENCE. I did, sir.

Mr. HORTON. Then you maintained that status until you retired in May of 1971?

Mr. FLORENCE. That is right, sir.

Mr. HORTON. Now, during the time that you were at Air Force Headquarters from 1945 to 1960 you have indicated that you had the responsibility for developing Air Force policy and procedure. Was

it your function at that stage to develop plans for evaluating, classifying, safeguarding, and declassifying?

In other words, did you have access to classified documents, or were you more or less in the position of trying to make recommendations with regard to procedural devices for handling these matters?

Mr. FLORENCE. Both, sir. My duties included working with classified defense information, classified documents. My duties also included developing the Air Force policies, participating in the development of interdepartmental policies originally, and later Department of Defense policies for safeguarding information.

Mr. HORTON. Now, again in 1960 to 1967 you indicated that you had certain positions in the Air Force Systems Command. You indicated you had responsibility for assuring the protection of classified defense information released or developed by contractors. What did this entail? Was that to guard the vault in which all of these documents were kept, or was it a case of having some actual physical jurisdiction over documents? What was the basis on which you were operating at that point?

Mr. FLORENCE. Those functions, I believe, could be quickly described in three parts. One, the function included developing instructions, and also implementing those instructions that already applied to the safeguarding of classified defense information released to and held by contractor elements in the country.

Mr. HORTON. When you say safeguarding, you mean physically safeguarding it, keeping it in a vault, instructions to personnel in the office as to how they should leave their desks when they go home, this sort of thing?

Mr. FLORENCE. Yes, sir.

Now we are speaking about the years you are referring to, to safeguarding information in the hands of industry.

Mr. HORTON. Right.

Mr. FLORENCE. And we are speaking in terms of a very broad responsibility of the industrial segment of our country to safeguard whatever is necessarily given to them that we designated as classified.

Mr. HORTON. Your job at this stage was to safeguard, not to classify or declassify?

Mr. FLORENCE. It did not include responsibility for designating that information requiring protection as classified.

Mr. HORTON. Again, from 1967 to 1971, when you were deputy assistant for Security and Trade Affairs—and I am not sure what that title encompasses—you again had a limited or restricted jurisdiction, did you not?

Mr. FLORENCE. Comparatively speaking it was limited, yes, sir.

Mr. HORTON. You have indicated in the course of your testimony, the bottom of page 4 and the top of page 5, that overclassification has increased. And then at the top of page 6 you indicate that you do not think there is any question but that there has been a misuse of overclassification.

I would certainly agree there has been overclassification and too much classification.

On the top of page 6—and the bottom of page 5—you made an estimate. You said you would guess there are 20 million classified documents, including reproduced copies. On what do you base that judgment?

You have had a very limited access in the Department of the Air Force. You were not with the Department of Defense. You do not have complete access to all of the documents involved. On what basis do you make that estimate of some 20 million classified documents?

Mr. FLORENCE. Sir, my position included contact throughout the Department of Defense. The estimate—the figure is an estimate. It could be much higher.

Mr. HORTON. All right. But I am just trying to find out on what you based it. In other words, did you base it partly on your own knowledge and partly on what you would call hearsay knowledge, what somebody told you?

Mr. FLORENCE. Pardon me, sir. This is a calculation on such factors as knowing that last year there was found to be something like 250 file cabinets, four or five drawer cabinets, of information containing classified documents at one of our commercial firms doing contract work for the Government. This is only one possible element which I used for the figure here of 20 million.

Mr. HORTON. This is really a guess then, is it not?

Mr. FLORENCE. Yes, sir, it sure is, sir. It could be higher; it could be some lower.

Mr. HORTON. I want you to be accurate, because on the top of page 6 you said the disclosure of at least 99½ percent of classified documents could not be prejudicial to the defense interests of the Nation.

On what basis do you make that statement?

Mr. FLORENCE. That is a personal estimate, sir.

Mr. HORTON. You don't have access to all documents throughout the defense structure, do you?

Mr. FLORENCE. No, sir, I do not.

Mr. HORTON. That is a pretty high estimate. I want to know the expertise on which you base that statement. I want to know how accurate that is.

Is that just a guess? Is that something based on your knowledge, because you have seen all of these documents and you have examined all of these documents and you have had complete access to all of these documents, therefore, you say it is 99½ percent.

Or is this based on the fact that you have been working in one particular area and you have talked with different people, you have some general idea about it and based on some sort of a sample that you have made in your own jurisdiction, you came up with the 99½ percent?

I would like to know specifically on what that judgment is based.

Mr. FLORENCE. All right, sir. Let's consider my position that I just left with the Air Force, where two factors of duties bear on the question you raised.

One, I received individuals coming into my office, coordinating work they were doing in the way of issuing weapon system planning information, weapon systems procurement or development information, or any other term we might agree on to describe the administrative work that goes on in Air Force Headquarters in administering their responsibility and in directing the responsibility of lower commands on the research, development, engineering, and procurement and distribution of weapons systems.

This subject was communicated with me daily. In the course of that work, it was my responsibility to explore with the authors of these

particular actions that came to me, to explore the relative merits of security involved in the planning directives, whatever the particular action referred to might have been.

In this particular type work I have had occasion to assist or attempt to assist in eliminating security restrictions from information comparable to this figure I have given to the committee of 99½ percent unclassified, perhaps one-half percent requiring real protection in the interests of the security of the United States. And another element of this function that I performed was the review of proposed testimony, proposed presentation to the Congress, to the committees of Congress, by the Secretary of Defense and lesser officials in the Department.

In reviewing these proposed statements and supportive budget actions and related matters, I dealt with documents that contained security classifications from one end to the other. But after making the review and assisting other members of the staff in eliminating unnecessary restrictions to the extent that I could help out on, we would eliminate something like this figure, maybe not quite that much, sir, but we would eliminate about 90 percent of the classifications on information that had been given classifications.

Mr. HORTON. I am not minimizing your position, but you will have to admit, will you not, that you had a very limited jurisdiction. In other words, you were in an office in the Air Force.

You were not at the top level in the Department of Defense, and you did not have access to all documents that are classified throughout the Army, Navy, Air Force, Marine Corps, the military structure, the Department of Defense.

You would have to admit that, would you not?

Mr. FLORENCE. I wish to make it very clear, sir, that my position description showed a very, very limited scope of both authority and responsibility. That is the position description. But may I add one more thing, sir?

In working from this very limited statement of functions, written and fully defined statement of responsibilities which were very, very narrow, my work went into areas of responsibilities far, far beyond what was described in my position description.

I was very, very proud to participate in many an action that came nowhere near within my position description, but did fall within the broad coordination responsibilities I had.

Mr. HORTON. I will yield to the gentleman from New York.

Mr. REID. I thank the gentleman.

You had access, did you not, to State Department cables, to a variety of material of intelligence character from the Navy, Army, Marine Corps, as well as the Air Force, and overall intelligence from CIA from time to time?

In other words, you were not just limited to Air Force intelligence?

Mr. FLORENCE. I was not, sir.

Mr. REID. Thank you.

Mr. HORTON. Is your answer "yes" to that question, that Mr. Reid asked, that you had access to all of this other material?

Mr. FLORENCE. May I say in answer to the question, specifically, my access to the material described by Mr. Reid, in recent years, was very, very limited. But I did, of course, have access to some of the material such as he described.

In previous positions, for example, in the 15 years that I served in a policy position with the Air Force, I functioned very broadly in the interdepartmental field that is represented by his question, sir.

Mr. HORTON. It was announced last week that Secretary Laird had ordered some time in the early part of this year procedures for declassification of documents. Are you familiar with that order?

Or were you familiar with that order at that time? I assume you were on duty up to May 31. Are you familiar with any order of the Department of Defense that required a review of declassification procedures?

Mr. FLORENCE. I am sorry if I must try and choose my answer, sir. There has been a plethora of Department of Defense instructions through the years about assigning only proper classifications and taking declassification action on Department of Defense information.

I can't quite place what you may be referring to in my memory at the moment.

Mr. HORTON. In other words, you are not familiar with any such order?

Mr. FLORENCE. I don't know which one you are speaking of, sir.

Mr. HORTON. An order of the Secretary of Defense. Are you familiar with any order of the Secretary of Defense requiring declassification procedures and putting emphasis on declassifying documents?

Mr. FLORENCE. Oh, yes, sir. I have participated in——

Mr. HORTON. What was the last one you are familiar with?

Mr. FLORENCE. I will refer to those in two categories, sir. The Department of Defense publishes policy directives, and then they also issue memoranda and letter directives very frequently.

If you give me a moment, sir——

Mr. HORTON. You want to look for something?

Mr. FLORENCE. If I might take just a moment. I have here DOD instruction 5210.47, issued December 31, 1964, 7 years ago. That is the current Department of Defense policy on security classification of official information. I am familiar with this.

Mr. MCCLOSKEY. Will the gentlemen yield?

Mr. HORTON. Yes.

Mr. MCCLOSKEY. I wonder if I could request unanimous consent that DOD instruction 5210.47 be inserted in the record at this point. There has been a lot of reference to it and I think we ought to have it.

Mr. MOORHEAD. That directive is not classified, is it?

Mr. FLORENCE. No, sir, it was not.

Mr. MOORHEAD. Without objection it will be made a part of the record.

(NOTE.—Up-to-date copy (with revisions) of DODI 5210.47 is included with DOD testimony given June 29, 1971.)

(Department of Defense Instruction Document 5210.47 follows:)

NUMBER 5210.47
DATE December 31, 1964

Department of Defense Instruction

ASD(M)

SUBJECT Security Classification of Official Information

TABLE OF CONTENTS

SECURITY CLASSIFICATION OF OFFICIAL INFORMATION

References: (a) DoD Directive 5120.33, "Classification Management Program," January 8, 1963
(b) DoD Instruction 5120.34, "Implementation of the Classification Management Program, January 8, 1963
(c) DoD Directive 5122.5, "Assistant Secretary of Defense (Public Affairs)," July 10, 1961
(d) DoD Directive 5200.1, "Safeguarding Official Information in the Interests of the Defense of the United States," December 16, 1963
(e) DoD Directive 5200.6, "Policy Governing the Custody, Use and Preservation of Department of Defense Official Information which Requires Protection in the Public Interest," March 22, 1957
(f) DoD Directive 5200.10, "Downgrading and Declassification of Classified Defense Information," July 26, 1962
(g) DoD Directive 5230.9, "Clearance of Department of Defense Public Information," August 17, 1957

I. PURPOSE AND APPLICABILITY

In accordance with references (a) and (b), this Instruction provides guidance, policies, standards, criteria and procedures for the security classification of official information under the provisions of Executive Order 10501, as amended, for uniform application throughout the Department of Defense, the components of which, in turn, through their implementation of this Instruction, shall accomplish its application to defense contractors, sub-contractors, potential contractors, and grantees. Determinations whether particular information is or is not Restricted Data are not within the scope of this Instruction.

II. DEFINITIONS

The definitions given below shall apply hereafter in the Department of Defense Information Security Program.

Classification: The determination that official information requires, in the interests of national defense, a specific degree of protection against unauthorized disclosure, coupled with a designation signifying that such a determination has been made.

Classified Information: Official information which has been determined to require, in the interests of national defense, protection against unauthorized disclosure and which has been so designated.

Declassification: The determination that classified information no longer requires, in the interests of national defense, any degree of protection against unauthorized disclosure, coupled with a removal or cancellation of the classification designation.

Document: Any recorded information regardless of its physical form or characteristics, including, without limitation, written or printed material; data processing cards and tapes; maps; charts; photographs; negatives; moving or still films; film strips; paintings; drawings; engravings; sketches; reproductions of such things by any means or process; and sound, voice or electronic recordings in any form.

Downgrade: To determine that classified information requires, in the interests of national defense, a lower degree of protection against unauthorized disclosure than currently provided, coupled with a changing of the classification designation to reflect such lower degree.

Formerly Restricted Data: Information removed from Restricted Data category upon determination jointly by the Atomic Energy Commission and Department of Defense that such information relates primarily to the military utilization of atomic weapons and that such information can be adequately safeguarded as classified defense information. (See subparagraph VIII, D. 13, below, regarding foreign dissemination.)

Information: Knowledge which can be communicated by any means.

Material: Any document, product or substance on or in which information may be recorded or embodied.

Official Information: Information which is owned by, produced by or is subject to the control of the United States Government.

Regrade: To determine that certain classified information requires, in the interests of national defense, a higher or a lower degree of protection against unauthorized disclosure than currently provided, coupled with a changing of the classification designation to reflect such higher or lower degree.

Research: All effort directed toward increased knowledge of natural phenomena and environment and toward the solution of problems in all fields of science. This includes basic and applied research.

Basic Research, which is the type of research directed toward the increase of knowledge, the primary aim being a greater knowledge or understanding of the subject under study.

Applied Research, which is concerned with the practical application of knowledge, material and/or techniques directed toward a solution to an existent or anticipated military or technological requirement.

Restricted Data: All data (information) concerning (1) design, manufacture or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but not to include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act. (See Section 11w, Atomic Energy Act of 1954, as amended, and "Formerly Restricted Data.")

Technical Information: Information, including scientific information, which relates to research, development, engineering, test, evaluation, production, operation, use and maintenance of munitions and other military supplies and equipment.

Technical Intelligence: The product resulting from the collection, evaluation, analysis and interpretation of foreign scientific and technical information which covers (1) foreign developments in basic and applied research, and in applied engineering techniques; and (2) scientific and technical characteristics, capabilities, and limitations of all foreign military systems, weapons, weapon systems and materiel, the research and development related thereto, and the production methods used in their manufacture.

III. POLICIES

A. Protecting Essential Information

1. The Preamble, Executive Order 10501, as amended, provides in part as follows:

> "Whereas the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action /_,_/.... it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure."

2. The primary objective of the Classification Management Program is to assure that official information is classified accurately under Executive Order 10501, as amended, when in the interests of national defense it needs protection against unauthorized disclosure.

3. Consistent with the above objective, the use and application of security classification to accomplish such protection shall be limited to only that information which is truly essential to national defense because it provides the United States with:

   a. A military or defense advantage over any foreign nation or group of nations; or

   b. A favorable international posture; or

   c. A defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert;

   which could be damaged, minimized or lost by the unauthorized disclosure or use of the information.

B. Informing the Public

The Department of Defense, in accordance with the policy of the United States Government, shall inform the American public of the activities of the Department of Defense to the maximum extent consistent with the best interests of national defense and security. Nothing contained herein, however, shall be construed to authorize or require the public release of official information. In this connection see reference (c).

C. Regrading and Declassification

In order to preserve the effectiveness and integrity of the classification system, assigned classifications shall be responsive at all times to the current needs of national defense. When classified information is determined in the interests of national defense to require a different level of protection than that presently assigned, or no longer to require any such protection, it shall be regraded or declassified.

D. Improper Classification

Unnecessary classification and higher than necessary classification shall be scrupulously avoided.

E. Misuse of Classification

Classification shall apply only to official information requiring protection in the interests of national defense. It may not be used for the purpose of concealing administrative error or inefficiency, to prevent personal or departmental embarrassment, to influence competition or independent initiative, or to prevent release of official information which does not require protection in the interests of national defense.

F. Safeguarding privately owned information

1. Privately owned information, in which the Government has not established a proprietary interest or over which the Government has not exercised control, in whole or in part, is not subject to classification by the private owner under the authority of this Instruction. However, a private owner, believing his information requires protection by security classification, is encouraged to provide protection on a personal basis and to contact the nearest office of the Army, Navy, or Air Force for assistance and advice.

2. Section 793 (d), Title 18 United States Code provides penalties for improper disclosure of "information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation."

3. Sections 224 to 227 of the Atomic Energy Act of 1954, as amended, provide penalties for the improper obtaining, disclosure or use of Restricted Data.

G. Safeguarding official information which is not subject to security classification

Official information which does not qualify for security classification or has been declassified, and which pursuant to lawful authority requires protection from unauthorized disclosure or public release for reasons other than national security or defense, shall be handled in accordance with references (e) and (g).

IV. CLASSIFICATION CATEGORIES

A. General

All official information which requires protection in the interests of national defense shall be classified in one of the three categories described below. Unless expressly provided by statute, no other classifications are authorized for United States classified information. Appendix A gives

examples of information which may come within the various categories. Section VI. below provides specific criteria for determining whether information falls within these categories.

B. TOP SECRET - The highest level of classification, TOP SECRET, shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation; such as, leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense. The use of the TOP SECRET classification shall be severely limited to information or material which requires the utmost protection. (See Part I, Appendix A.)

C. SECRET - The second highest level of classification, SECRET, shall be applied only to that information or material the unauthorized disclosure of which could result in serious damage to the Nation; such as, by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations. (See Part II, Appendix A).

D. CONFIDENTIAL - The lowest level of classification, CONFIDENTIAL, shall be applied only to that information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the Nation. (See Part III, Appendix A.) The designation "CONFIDENTIAL - MODIFIED HANDLING AUTHORIZED," which is not a separate classification category, identifies certain CONFIDENTIAL information pertaining to combat or combat-related operations which, because of combat or combat-related operational conditions, cannot be afforded

the full protection prescribed for CONFIDENTIAL information. The designation C-MHA shall be applied to that CONFIDENTIAL information pertaining to military operations involving planning, training, operations, communications and logistical support of combat units when combat or combat-related conditions, actual or simulated, preclude the full application of the rules and procedures governing dissemination, use, transmission and safekeeping prescribed for the protection of CONFIDENTIAL information. The designation may be applied prior to the introduction of the information into combat areas, actual or simulated, when the information is intended for such use and dissemination, but the rules and procedures for handling the information shall not be modified until the information is so introduced. C-MHA cannot be applied to material containing Restricted Data.

E. FOREIGN CLASSIFIED INFORMATION

1. Section 3 (e), Executive Order 10501, provides as follows:

> "Information Originated by a Foreign Government or Organization: Defense information of a classified nature furnished to the United States by a foreign government or international organization shall be assigned a classification which will assure a degree of protection equivalent to or greater than that required by the government or international organization which furnished the information."

2. Foreign security classifications generally parallel United States classifications. A Table of Equivalents is contained in Appendix B.

3. TOP SECRET, SECRET, and CONFIDENTIAL. If the foreign classification marking is in English, no additional U. S. classification marking is required. If the foreign classification marking is in a language other than English, an equivalent U. S. classification marking as shown in Appendix B will be added.

4. RESTRICTED.* Many foreign governments, and international organizations such as, for example, NATO, CENTO, and SEATO, use a fourth security classification "RESTRICTED" to denote a foreign requirement for security protection of a lesser degree than CONFIDENTIAL. Such foreign RESTRICTED information released to the United States Government under international agreement requiring its protection, usually does not require or warrant United States security classification under Executive Order 10501. Under the agreement covering the release of information, however, certain protection is required. In the usual case, therefore, in order to satisfy this requirement, a document or other material containing foreign RESTRICTED information shall show, or be marked additionally to show, in English, the name of the foreign government or international organization of origin and the word "RESTRICTED," e.g., UK-RESTRICTED; NATO-RESTRICTED. (See Appendix B.) Any document or other material marked as aforesaid shall be protected in the manner specified in reference (d). Documents or other material on hand falling in this category which already have been marked so as to require protection as "CONFIDENTIAL" or "C-MHA," as they are withdrawn from the file for any purpose, shall be re-marked in accordance with this subparagraph and the previously applied marking shall be obliterated or excised. Henceforth, the provisions of this subparagraph shall apply thereto.

5. The origin of all material bearing foreign classifications, including material extracted and placed in Department of Defense documents or material, shall be clearly indicated on or in the body of the material to assure, among other things, that the information is not released to nationals of a third country without consent of the originator.

* The effective date of this paragraph 4 is postponed. See paragraph XIV. B.

V. AUTHORITY TO CLASSIFY

A. Original Classification

1. Original classification is involved when -

a. An item of information is developed which intrinsically requires classification and such classification cannot reasonably be derived from a previous classification still in force involving in substance the same or closely related information; or

b. An accumulation or aggregation of items of information, regardless of the classification (or lack of classification) of the individual items, collectively requires a separate and distinct classification determination.

2. For the purpose of assuring both positive management control of classification determinations and ability to meet local operational requirements in an orderly and expeditious manner, the Assistant Secretary of Defense (Manpower) will exercise control over the granting and exercise of authority for original classification of official information. Pursuant thereto, such authority must be exercised only by those individuals who at any given time are the incumbents of those offices and positions designated in or pursuant to subparagraph 3 below and Appendix C, including the officials who are specifically designated to act in the absence of the incumbents. The following general principles are applicable:

a. Appendix C designates specifically the officials who may exercise original TOP SECRET or SECRET classification authority and who among them may make additional designations. All such additional designations shall be specific and in writing.

b. The authority to classify is personal to the holder of the authority. It shall not be exercised for him or in his name by anyone else, nor shall it be delegated for exercise by any substitute or subordinate.

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3. Pursuant to SECTION 2 (a) of Executive Order 10501, as amended, original classification authority may be exercised by the following:

   a. For TOP SECRET - The officials designated in or pursuant to Part I of Appendix C.

   b. For SECRET - The officials designated in or pursuant to Parts I and II of Appendix C.

   c. For CONFIDENTIAL - The officials designated in or pursuant to Parts I and II of Appendix C, and such of their subordinates as they designate. To be so designated, a subordinate shall have duties, responsibilities and knowledge sufficient to assure objective and accurate evaluations and determinations.

4. Each component of the Department of Defense, the Office of the Assistant Secretary of Defense (Administration) acting for the Office of the Secretary of Defense, shall submit to the Assistant Secretary of Defense (Manpower):

   a. An initial report and all subsequent changes, listing by title the officials who have been designated to exercise original TOP SECRET classification authority.

   b. An initial report and all subsequent changes, showing the total number of officials who have been designated to exercise original SECRET classification authority.

   c. When request is made by the OASD (M), a report of approximate numbers of individuals who have been designated to exercise original CONFIDENTIAL classification authority.

   d. Initial reports required under a. and b., above, shall be submitted within ninety (90) days after the effective date of this Instruction. Subsequent reports of changes shall be submitted with sufficient promptness to assure that the master lists are accurate to within twenty (20) days for TOP SECRET and six (6) months for SECRET original classification authority.

B. Derivative Classification

1. Derivative classification is involved when -

a. An item of information or collection of items is in substance the same as or closely related to other information with respect to which there is an outstanding proper classification determination of which the derivative classifier has knowledge and on which he is relying as his basis for classification; or

b. The information is created as a result of, in connection with, or in response to, other information dealing in substance with the same or closely related subject matter which has been and still is properly classified; or

c. The classification to be applied to the information has been determined by a higher authority and that classification determination is communicated to and acted upon by the derivative classifier.

2. Derivative classification is the responsibility of each person whose official duties require decision by him as to whether information contained in or revealed by material he prepares or produces requires classification under the circumstances stated in subparagraph 1, above, subject to the following general rules:

a. In the case of a document, the commander, supervisor, or other official whose signature or other form of approval is required before the document may be issued, transmitted or referred outside the office of origin, is responsible for the necessity, currency and accuracy of the derivative classification assigned to that document.

b. In the case of material other than a document, the commander, supervisor or other official in charge at the lowest operational level where the material is being produced is responsible for the necessity, currency, and accuracy of the derivative classification assigned to that material except that, by specific action, appropriate authority may place this

responsibility at a different level which is clearly identified.

c. In connection with all operations where derivative classification of documents or other material occurs, definite procedures shall be established by appropriate authority so that, without undue delay and as a matter of the regular course of business, the necessity, currency and accuracy of each derivative classification will be reviewed. When necessary, corrective action shall be taken or instituted.

3. In those situations involving the copying or extracting of classified information from another document, or involving the reproduction or translation of a whole classified document, the individual responsible for such copying, extracting, reproduction, or translation shall be responsible for assuring that the new document or copy bears the same classification as that assigned to the information or document from which the new document or copy was prepared. Questions on the propriety of current classification should be resolved as indicated in paragraph VII, G.

C. Classification Pending

A person who originates or develops information or is in possession of information which he believes should be classified, but who lacks classification authority or for any other reason is not able to make a classification determination which he believes to be correct, shall safeguard the information at the level to which it is believed to belong, and refer it promptly to an official who can and will make the classification determination. In order to provide necessary protection during this interim period, a tentative classification which clearly shows that it is tentative may be used.

D. Industrial Operations

Classification in industrial operations shall be accomplished strictly in accordance with the guidance set forth in the Security Requirements Check List (DD Form 254), or in other classification guidance supplied in connection with specific contracts, as provided in the DoD Industrial Security Regulation and the Industrial Security Manual. Industrial management shall limit the number of persons

authorized to take these actions to the minimum number consistent with operational requirements, and shall maintain records sufficient to report, on call, the number authorized to act at each level, TOP SECRET, SECRET and CONFIDENTIAL.

VI. CLASSIFICATION PRINCIPLES AND CONSIDERATIONS

A. General

An evaluation of information forms the base for classification. A document or other material is classified either

1. Because of the information it contains which may be ascertained by study, analysis, observation or use of it; or

2. Because of the information it may reveal when associated with other information, including that which the classifier knows already has been officially released into the public domain.

B. Identification of Information Requiring Protection

Classification determinations must be preceded by an exact identification of each item of information which may require security protection in the interests of national defense. This process involves identification of that specific information which comprises the basis for the particular military or defense advantage or advantages which, if the information were compromised, would or could be damaged, minimized, or lost, thereby adversely affecting the national defense.

C. Combination and Interrelation

The relationship of individual items, classified or unclassified, within a program or project or in different programs or projects may have a cumulative effect requiring initial or higher classification when such items are combined or considered together.

D. Dissemination Considerations

The degree of intended or anticipated dissemination and use of material, and whether the end purpose to be served renders effective security control impractical, are factors which must be considered. These factors do not necessarily preclude classification, but they do force consideration of the extent to which classification under such circumstances may degrade the classification system by attempting to impose security controls in impractical situations. Determinations significantly dependent upon these factors shall not be made below the level of the official having original classification authority over the particular plan, program, project or item.

E. Nonmilitary Considerations

Information which meets the definition of Restricted Data or Formerly Restricted Data is not within the scope of this paragraph. In certain circumstances, it may be necessary to weigh the benefits which would accrue to the United States generally from the unclassified use by other government agencies or commercial interests of information which is classified or otherwise classifiable under Executive Order 10501, against the military or technological advantage which would be gained or retained by classification or continued classification of the information. Where a net advantage to the United States distinctly can be ascertained beyond a reasonable doubt, that factor should be considered in reaching the classification determination. In such a case, final determination to withhold classification or to declassify shall be made only by the Secretary of Defense; Deputy Secretary of Defense; Secretary, Under Secretary, and Assistant Secretaries of the Army; Secretary, Under Secretary, and Assistant Secretaries of the Navy; Secretary, Under Secretary, and Assistant Secretaries of the Air Force; Chairman, Joint Chiefs of Staff; Chief of Staff, Army; Chief of Naval Operations; Chief of Staff, Air Force; Commandant, Marine Corps; Director, Defense Research and Engineering; Assistant Secretaries of Defense; General Counsel of the Department of Defense; Assistants to the Secretary of Defense; Director, Defense Intelligence Agency; Director, National Security Agency. Public releases of such information are subject to references (e) and (g).

F. Specific Classifying Criteria

A determination to classify shall be made only when one or more of the following considerations are present and the unauthorized disclosure of the information could result in a degree of harm to the national defense:

1. The information provides the United States, in comparison with other nations, with a scientific, engineering, technical, operational, intelligence, strategic or tactical advantage related to the national defense.

2. Disclosure of the information would weaken the international position of the United States, create or increase international tensions contrary to United States interests, result in a break in diplomatic relations, or lead to hostile economic, political, or military action against the United States or its allies, thereby adversely affecting the national defense.

3. Disclosure of the information would weaken the ability of the United States to wage war or defend itself successfully, limit the effectiveness of the armed forces, or make the United States vulnerable to attack.

4. There is sound reason to believe that other nations do not know that the United States has, or is capable of obtaining, certain information or material which is important to the international posture or national defense of the United States vis-a-vis those nations.

5. There is sound reason to believe that the information involved is unique, and is of singular importance or vital to the national defense.

6. The information represents a significant breakthrough in basic research which has an inherent military application potential in a new field or radical change in an existing field.

7. There is sound reason to believe that knowledge of the information would (a) provide a foreign nation with an insight into the war potential or the war or defense plans or posture of the United States; (b) allow a foreign nation to develop, improve or refine a similar item of war potential; (c) provide a foreign nation with a base upon which to develop effective countermeasures; (d) weaken or nullify the effectiveness of a defense or military plan, operation, project or activity which is vital to the national defense.

G. Classifying Research Data

Ordinarily, except for information which meets the definition of Restricted Data, basic scientific research or results thereof are not classified. However, classification would be appropriate if the information concerns an unusually significant scientific "breakthrough," and there is sound reason to believe it is not known or within the state-of-the-art of other nations, and it supplies the United States with a military or technological advantage. Classification also would be appropriate if the potential military or industrial application of the information, although not specifically visualized, would afford the United States a significant military or technological advantage in terms of technological lead time.

H. Effect of Open Publication

Appearance in the public domain, regardless of source or form, of information currently classified or being considered for classification does not preclude initial or continued classification; however, such disclosures require immediate re-evaluation of the information to determine whether the publication has so compromised the information that downgrading or declassification is warranted. Similar consideration must be given to related items of information

in all programs, projects or items incorporating or pertaining to the compromised items of information. In these cases, if the release is shown to have been made or authorized by an official Government source, classification of clearly identified items may be no longer warranted. Classification should be continued until advised to the contrary by a competent Government authority. Questions on the propriety of continued classification should be referred to the office having prime responsibility over the subject matter or, if that office can not be identified, to the Directorate for Classification Management, Office, Assistant Secretary of Defense (Manpower).

I. Classifying Material Other Than Documentation

Items of equipment or other physical objects may be classified only where classified information may be derived from them by visual observation of internal or external appearance, structure, operation, test, application or use. The overall classification assigned to equipment or physical objects shall be at least as high as the highest classification of any of the items of information revealed by the equipment or objects, but may be higher if the classifying authority determines that the sum of classified or unclassified information warrants such higher classification. In every instance where classification of an item of equipment or other physical object is determined to be warranted, such determination must be based on a finding that there is at least one aspect of the item or object which affords the United States a military or technological advantage. If mere knowledge of the existence of the item of equipment or physical object would compromise or nullify its military or technological advantage, its existence would warrant classification.

J. State-of-the-Art and Intelligence

Classification requires the consideration of the extent to which the same or similar information is known or is available to others. It is also important to consider whether it is known, publicly or internationally, that the United States has the information or even is interested in the subject matter. The state-of-the-art in other nations is a vital factor requiring consideration.

VII. CLASSIFICATION RESPONSIBILITIES

A. Major DoD Component Responsibility

Each DoD component required to implement this Instruction shall establish appropriate means for supervising the application of the provisions of this Instruction and for reporting on significant developments resulting therefrom.

B. Command and Supervisory Responsibilities

Classification is a function of command or supervisory responsibility. Commanders and supervisors at all echelons shall establish and supervise on a regular basis such review and corrective procedures as may be necessary to assure that the classification determinations within their own and subordinate echelons are being made by proper authority and provide the correct degree of protection necessary to serve current national defense requirements.

C. Originator's Responsibility

The originator of a plan, program or project shall include therein, under a clearly identifiable title or heading, a statement providing classification guidance with respect to that effort. This guidance shall form the basis for classification of elements of that effort in the planning stages until more formal guidance is issued by appropriate authority.

D. Classification Planning

The commander or official charged with the development of any plan, program or project, in which classification is a factor, shall include therein, under a clearly identifiable title or heading, a classification plan, prepared by qualified personnel who have at hand the necessary knowledge and technical intelligence to make reasonable determinations, covering the following:

1. Isolation and identification of items of information involved in the effort which require classification.

2. Classification guidance specifying the levels of classification to be applied to identified items of information and material developed in connection with the plan, program or project.

3. A schedule for phased downgrading and declassification covering each item of classified information and material based on development phases and specific events.

4. Provision for periodic review to determine the currency and accuracy of the classification, downgrading and declassification guidance provided.

E. Individual Action

Each individual who originates a document or other material is responsible for identifying the items of information which, in his opinion, based upon available guidance or upon his own evaluation, require security protection through classification. He then shall classify the document or material or, if he does not have the requisite authority to classify, he shall refer the matter to the nearest knowledgeable classifying authority for appropriate action.

F. Signing Authorities

The responsible official, prior to signing or approving a document which bears security classification markings, will review its content specifically to insure that the classifications assigned to information contained therein, or which would be revealed thereby, are necessary, current and accurate and that all requirements of this Instruction have been met. This responsibility cannot be delegated.

G. Regrading or Declassification Inquiries

Requests for regrading or declassification of material normally will be referred to the office of origin.

1. Where the office of origin has been abolished, cannot be identified or otherwise has lost its identity, or if its functions have been transferred to an element

of the Department of Defense so that its records have become a part of Department of Defense official files and property, regrading or declassification determinations with respect to that material thereafter will be the responsibility of the Department of Defense element having current jurisdiction over the subject matter. In these cases, another agency may have a substantial interest in continuing the assigned classification. If so, the matter shall be brought to that agency's attention. Except with the consent of the other agency, no action will be taken for thirty days. In the meantime, the other agency may submit comments with respect to the proposed regrading or declassification action. The Department of Defense element having jurisdiction shall make the final determination in the case.

2. Where records of the office of origin have been officially transferred to, and have become a part of the official files and property of, another department or agency outside the Department of Defense, that department or agency shall have jurisdiction over the classification of the material involved.

H. Inquiries from Outside Department of Defense

Inquiries from outside the Department of Defense, requesting advice concerning the classification of defense information, including inquiries received from private parties, shall be referred for action to the activitity within the Department of Defense having the principal interest in the subject matter. If clearly within Department of Defense interest and control, or if received from an agency which does not have the requisite classifying authority under Executive Order 10501, the interested Department of Defense activity should specify the classification required with reasons therefor and so mark the material, or advise that classification is not considered warranted under Executive Order 10501. If clearly not subject to Department of Defense interest and control, the matter should be referred to the agency having primary interest in the subject matter. A tentative classification should be applied and the material protected until the responsible agency has completed its classification action.

VIII. MECHANICS OF CLASSIFICATION

A. General Requirements

1. Identification and determination. Each document or other material shall be classified according to the classification of the information contained in or revealed by it. It is essential to identify and evaluate individually the items of information which, intrinsically, require security protection and then to consider whether in total effect, compromise of the document or material as a whole would create a greater degree of damage than compromise of the items of information individually. The ultimate classification of the document or material will depend upon the classification necessary to afford appropriate protection for the highest classified item of information or for the document or material as a whole, whichever is higher.

2. Designation. Information determined to require classification shall be so designated, generally in the form of physical marking. Designation by means other than physical marking may be used but should be followed by physical marking as soon as practicable.

B. Purposes of Designation

Designation, by physical marking, notation, or other means, serves to record the classification decision, to inform and to warn recipients of the classification assigned, to indicate the level of protection required, to indicate the information that must be withheld from unauthorized persons, to provide a basis for derivative classification, and to facilitate downgrading and declassification actions.

C. Marking Requirements

Material which contains or reveals classified information must be marked, as soon as practicable after identification and determination, with TOP SECRET, SECRET, or CONFIDENTIAL classification markings and downgrading and declassification notations. In addition, each classified document shall reflect its date of origin, and the office or the organization responsible for its preparation and issuance. In marking classified material, the following rules apply:

1. The assigned classification shall be marked clearly and conspicuously on all documents and other material and parts thereof which contain identifiable classified information.

2. Automatic downgrading and declassification notations shall be placed immediately below, or adjacent to and in conjunction with, the classification marking at the bottom of the first page or title page of a document. If this is not practical, the notation shall be placed conspicuously in a similarly prominent place. When appropriate, the downgrading and declassification instructions may be included in the text. Whenever a useful purpose will be served thereby, each separate paragraph should be marked to show the automatic downgrading and declassification group that applies to its contents.

3. Either each paragraph of a classified document, when there are differences in their classification, shall be marked to show the degree of classification, if any, assigned to the information it contains or reveals; or a statement shall be included on the document or in its text identifying the parts of the document that are classified and their assigned classification; or an appropriate classification guide supplied. When different items of information in one paragraph require different classifications, but segregation into separate paragraphs would destroy continuity or context, the highest classification required for any item shall be applied to that paragraph. In marking paragraphs, the appropriate marking shall be placed immediately preceding and to the left of the paragraph involved. If desired, the symbols (TS), (S), (C), and (U) may be used. When appropriate, the symbols (RD) or (FRD) may be added.

4. In cases where the use of a classification is required to protect a compilation of information the individual parts of which are unclassified, but their total content or their association is classified, the overall classification assigned to such documents shall be placed conspicuously at the top and bottom of each page and on the outside of the front and back covers, if any, and an explanation of the basis for the assigned classification shall be included on the document or in its text.

5. Subjects, titles, abstracts and index terms shall be selected, if possible, so as not to require classification. However, a classified subject, title, abstract or index term may be used when necessary to convey meaning. To show its classified or unclassified status, each such item shall be marked with the appropriate symbol, (TS), (S), (C), or (U) placed immediately following and to the right of the item. When appropriate, the symbols (RD) or (FRD) may be added.

6. The classification of a file, folder or group of documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual classification requirements.

7. Any document which transmits or forwards other documentation containing classified information shall bear classification and other markings sufficient to protect the classified information being transmitted or forwarded. In addition, the transmitting or forwarding document shall bear a notation showing its own classification, group, and other markings, if any, when standing alone.

8. Copies and reproductions of classified material, regardless of form, will be marked with the classification markings and notations reflected on the original material from which copied or reproduced.

9. Translations of United States classified information into a language other than English shall show the United States as the country of origin, and shall be marked with both the U. S. classification and the foreign language equivalent of the classification assigned to the original English version.

10. Material, such as drafts, briefs, memoranda, notes, rejects, preliminary runs, typewriter ribbons, carbons, etc., developed in connection with the handling, processing, production and utilization of classified information shall be classified and marked, or otherwise handled in a manner to assure adequate protection of the classified information involved.

D. Marking Various Kinds of Material

Details of physically marking documents and other material with assigned classifications may vary somewhat with organizational and operational requirements and with the physical characteristics of the material.

1. On ordinary documents, classification markings shall be stamped, printed or written in letters that are larger than those used in the text of the document. On other types of material, classification markings shall be stamped, printed, written, painted, or affixed by means of a tag, sticker, decal, or similar device in a conspicuous manner. If markings are not physically possible on the material, written notice of the assigned classification shall be provided all recipients of the material.

2. Notations and instructions such as special handling notices, the espionage law notation, downgrading and declassification notations, special reproduction and dissemination restrictions and other similar items may be affixed, when required, by any convenient means, including stamping, printing, writing, typewriting, painting, or by means of a tag, sticker, decal, or similar device.

3. Permanently bound documents, the pages of which are permanently and securely fastened together in such manner that one or more pages cannot be extracted without defacement or alteration of the document, shall be conspicuously marked on the top and bottom of the first, last and title pages, and on the outside of the front and back covers with the overall classification assigned to the document. This is a minimum requirement and does not preclude the use of internal markings to identify classified components. A document shall be considered to be permanently bound when the pages cannot be removed without damage or mutilation. It must be sewed, and have the glued binding common to the bookbinding craft. On such permanently bound documents, the downgrading and declassification notation and, when required, the espionage law notation shall be placed on the first or title page of the document.

4. Markings and notations for temporarily bound or unbound documents will be applied as follows: Major components of documents such as attachments, appendices, annexes, tabs, enclosures and similar components shall be treated as separate documents for this purpose:

   a. The overall classification assigned to a document shall be placed conspicuously at the top and bottom of the first page or title page, and on the outside of the front and back covers, if any. Similarly, the overall classification shall be placed conspicuously at the top and bottom of any subsequent addition (such as an indorsement) that covers the first page of the document. When these requirements result in a page, except one which is otherwise blank, being marked with a higher classification than that assigned to its own individual contents, either each paragraph on that page shall be marked with its own individual classification or an explanation shall be made of the classifications assigned to information on that page.

   b. Each page, other than those described above, shall be marked according to its own individual content, and the classification marking shall be placed conspicuously at the top and bottom of the page. However, when a sheet has printing on both sides, the higher of the two-page classification shall be used on both pages. When this results in a page being marked with a higher classification than that assigned to its own individual contents, either each paragraph on that page shall be marked with its own individual classification or an explanation shall be made of the classifications assigned to information on that page.

5. Charts, maps and drawings shall bear the appropriate classification marking under the legend, title block or scale, in such manner as to differentiate between the classification assigned to the document as a whole and the classification assigned to the legend or title.

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The markings also will be inscribed at the top and bottom of each such document. Where the customary method of folding or rolling charts, maps or drawings would cover the classification markings, additional classification markings will be placed so as to be clearly visible when the document is folded or rolled.

6. Photographs and films, including negatives, and their containers shall be marked in such a manner as to assure that any recipient or viewer will know that classified information of a specified level of classification is involved.

7. Recordings, sound or electronic, shall contain at the beginning and end a statement of the assigned classification which will provide adequate assurance that any listener or receiver will know that classified information of a specified level of classification is involved. The recording material and containers also will be marked conspicuously.

8. A deck of classified accounting machine cards may be marked as one single classified document. A deck so marked shall be stored, transmitted, destroyed and otherwise handled in the manner prescribed for other classified documents of the same classification. An additional card shall be added, however, to identify the contents of the deck, the highest classification involved, and the downgrading/declassification grouping assigned to the deck. The individual cards of a deck marked as one single classified document, so long as they remain within the deck, need not be marked individually. Cards removed for separate processing or use, however, shall be protected to prevent compromise of any classified information contained therein, and for this purpose shall be marked individually, if necessary, as prescribed by subparagraphs 1. and 2., above.

9. Electrical machine and automatic data processing tapes will bear external markings and internal notations sufficient to assure that any recipient of the tapes, or of the classified information contained therein when reproduced by any medium, will know that classified

information of a specified level of classification is involved.

10. Classification markings on pages of listings produced on automatic data processing equipment may be applied by the equipment, provided the first and last pages of the listing and the front and back covers, if any, are marked as prescribed by subparagraphs 1. and 2., above. If individual pages are removed from the listing, each page so removed shall be marked as prescribed by subparagraphs 1. and 2., above.

11. Classified documents furnished to a DoD contractor, or to any other person or activity outside the Executive Branch, shall bear the notation: "This material contains information affecting the national defense of the United States within the meaning of the Espionage Laws (Title 18, U.S.C., Sections 793 and 794), the transmission or revelation of which in any manner to an unauthorized person is prohibited by law." (Section 5j, E. O. 10501)

12. Classified documents containing Restricted Data shall bear, for internal DoD use, the notation RESTRICTED DATA. When released outside the Department of Defense, such documents also shall bear the notation: "This document contains RESTRICTED DATA, Atomic Energy Act of 1954." (Section 5j, E. O. 10501)

13. Classified documents containing information identified as Formerly Restricted Data shall bear the notation: "FORMERLY RESTRICTED DATA - handle as Restricted Data in foreign dissemination -- Section 144b, Atomic Energy Act of 1954."

14. Classified messages shall be marked at the top and bottom with the assigned classification in the manner prescribed for unbound documents. In addition, the first item of information in the text of a classified message will be the security classification. The downgrading and declassification grouping notation applicable to a message will be placed at the end of the text.

IX. CLASSIFICATION GUIDANCE

A. General

A classification guide, based upon classification determinations made by the original classifying authority, shall be issued for each program and project. Successive operating echelons shall prescribe any further detailed guidance deemed essential to assure accurate, uniform and consistent derivative classifications

B. Multiservice Interest

For each plan, program, project and item involving or being used by more than one component of the Department of Defense, (1) the component in the Office of the Secretary of Defense which assumes or is expressly designated to exercise overall cognizance or (2) the Department of Defense component which is expressly designated to serve as the executive or administrative agent for the plan, program or project shall be responsible for assuring the issuance of appropriate classification guidance for the particular plan, program, project or item.

C. Action by the Directorate for Classification Management

The Directorate for Classification Management, OASD (M), shall be responsible for assuring the issuance of appropriate classification guidance in fields of activity or for items for which no central cognizant authorities are designated or prescribed and for which there is a need for centrally issued classification guidance. The Department of Defense Classification Review and Advisory Board shall be utilized in the development of these guidances.

D. Project Phases

Whenever feasible, classification guidance shall cover, phase by phase, the transition from research through development, test, procurement, production, service use and obsolescence.

E. Review

Classification guidance shall be reviewed by the originator for currency and accuracy not less often than once each year. Any changes shall be issued promptly to all holders of the guidance. If no changes are made, the originator shall place on the record copy of the guidance a notation, signed by an appropriate official, attesting to the fact of the review and the date thereof.

F. Policy

Classification guidance must be sufficiently detailed to identify the critical items of information which require classification and yet sufficiently flexible to assure accurate classification of documentation and other material developed at various levels and during different stages of the program or project. It is particularly important that such guidance not result in stagnation and overclassification through automatic application of guidance which is too detailed and inflexible.

G. Copies of Guidance to OSD

Except as determined by the Secretary of Defense for certain categories of information, copies of each classification guide and changes thereto shall be sent to the Directorate for Security Review, OASD (PA), and to the Directorate for Classification Management, OASD (M).

X. AERIAL PHOTOGRAPHY

(To be issued later)

XI. REGRADING AND DECLASSIFICATION

(To be issued later)

XII. REPORTS

(To be issued later)

30 Section IX, E, F, G.
Section X.
Section XI.
Section XII.

XIII. IMPLEMENTATION

This Instruction shall be implemented by the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, and the Defense Agencies. Two (2) copies of implementing instructions should be forwarded to the Assistant Secretary of Defense (Manpower) within ninety (90) days.

XIV. EFFECTIVE DATE

A. Except as stated in B. below, this Instruction is effective immediately.

B. Section IV, subparagraph E, 4, dealing with foreign RESTRICTED information, will be effective upon publication of appropriate changes to reference (d), providing instructions on safeguarding foreign RESTRICTED information, and to DoD Directive 5210.21, Implementation of NATO Security Procedures.

Norman S. Paul
Assistant Secretary of Defense (Manpower)

APPENDIX A
(See Section IV)

Part I. Examples of Information which may require TOP SECRET classification:

(1) A strategic plan documenting the overall conduct of a war.

(2) War planning documents which contain worldwide --

(a) Planning data and assumptions,

(b) Wartime planning factors for the use of nuclear weapons,

(c) Intelligence estimates of enemy capabilities,

(d) Force composition and development, and

(e) Real estate requirements and utilization by geographical area which are time-phased for a period of months.

(3) An operations plan either for a single operation or a series of connected operations containing any of the factors in (2) above and with sortie rates or target data.

(4) A document containing any of the considerations in (2) above directly related to a TOP SECRET war planning document, the unauthorized disclosure of which standing alone could result in actual compromise of a particular TOP SECRET plan. (This does not necessarily include proposed budgets, current peacetime deployment of units or munitions, or peacetime manpower and organization programs for future years. Normally such information is too general in nature to reveal TOP SECRET plans.)

(5) Intelligence documents that contain completed intelligence of such scope that it reveals a major intelligence production effort on the part of the United States and which would permit an evaluation by unauthorized recipients of the success attained by, or the capabilities of, the United States intelligence services. (Normally, a broad and complete intelligence annex or a summary of similar importance. Not a report or a digest of reported items of information, except as covered in (6) below.)

(6) A plan or policy for conducting intelligence or other special operations and information revealing a particular intelligence operation or other special operation, provided that the compromise of such plan, policy, or particular operation could result in exceptionally grave damage to the Nation. Intelligence operations may include certain specifically designated and controlled collection projects.

(7) Vital information concerning radically new and extremely important equipment (munitions of war), such as nuclear weapons, atomic weapons stockpile data, and any other munitions of comparable importance the scientific or technological development aspects of which are vital to the national defense. (The AEC-DoD classification guide distributed by the Atomic Energy Commission indicates the levels of classification of RESTRICTED DATA, FORMERLY RESTRICTED DATA and certain defense information.)

Part II. Examples of Information which may require SECRET classification:

(1) A war plan or a complete plan for a future operation of war not included under TOP SECRET, and documents showing the disposition of our forces the unauthorized disclosure of which, standing alone, could result in actual compromise of such SECRET plans.

(2) Defense or other military plans not included under TOP SECRET or (1) above including certain development and procurement plans and programs but not necessarily including all emergency plans.

(3) Specific information which, standing alone, reveals the military capabilities or state of preparedness of the Armed Forces, but not including information the unauthorized disclosure of which could result in compromise of a TOP SECRET plan.

(4) Information that reveals the strength of our forces engaged in hostilities; quantities or nature of their equipment; or the identity or composition of units in an active theater of operations or other geographic area where our forces are engaged in hostilities, except that mailing addresses may include organization designation. Information which reveals the strength, identity, composition, or location of units normally requires classification as SECRET in time of war. In peacetime SECRET classification of information pertaining to units may be appropriate when related to war plans, estimates or deployments which involve classified information.

(5) Intelligence and other information, the value of which depends upon concealing the fact that the United States possesses it, except when possession of intelligence or other information concomitantly discloses a particular intelligence or other special operation falling within Part I, item (6) above.

(6) Particulars of scientific or research projects which incorporate new technological developments or techniques having direct military application of vital importance to the national defense.

(7) Specific details or data relating to new material or important modifications of material which reveal significant military advances or new technological developments having direct military application of vital importance to the national defense.

(8) Information of vital importance to the national defense concerning specific quantities of war reserves.

(9) Indications of weakness, e.g., shortages of significant or sensitive items of equipment.

Part III. Examples of Information which may require CONFIDENTIAL classification:

(1) Operational and battle reports which contain information of value to the enemy.

(2) Intelligence reports.

(3) Military radio frequency and call sign allocations of special significance or those which are changed frequently for security reasons.

(4) Information which indicates strength of our ground, air, and naval forces in United States and overseas areas, identity or composition of units, or quantity of specific items of equipment pertaining thereto. (A defense classification is normally required, if such information reflects the overall strength figures or quantities of weapons whose characteristics are themselves classified, or additional factors necessitate security protection.)

(5) Unless a higher classification is needed to protect information relating to a particular munition:

(a) Documents and manuals containing technical information used for training, maintenance, and inspection of classified munitions of war.

(b) Research, development, production, and procurement of munitions of war.

(c) Performance characteristics, test data, design, and production data on munitions of war.

(6) Operational and tactical doctrine.

(7) Mobilization plans.

(8) Personnel security investigations and other investigations which contain information requiring protection against unauthorized disclosure.**

(9) Matters and documents of a personal and disciplinary nature, the disclosure of which could be prejudicial to discipline and morale of the Armed Forces.**

(10) Documents used in connection with procurement, selection and promotions of military personnel, the disclosure of which could violate the integrity of the competitive system.**

** While in all of the above cases, the assignment of CONFIDENTIAL must be justified, particular care must be exercised with respect to examples 8, 9, and 10 above to make certain that such matters are assigned to the CONFIDENTIAL category only if in fact the unauthorized disclosure of such information could be prejudicial to the national defense. If such information does not require security protection, but nevertheless requires protection in the national interest, it will be safeguarded by the application of the provisions of reference (e).

APPENDIX B

EQUIVALENT FOREIGN SECURITY CLASSIFICATIONS
(See paragraph IV, E).

Country	TOP SECRET	SECRET	CONFIDENTIAL	_____
Argentina	ESTRICTAMENTE SECRETO	SECRETO	CONFIDENCIAL	_____
Australia	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED
Austria	STRENG GEHEIM	GEHEIM	VERSCHLUSS	NUR FÜR DEN DIENSTGEBRAUCH
Belgium(French)*	TRES SECRET	SECRET	CONFIDENTIEL	DIFFUSION RESTREINTE
(Flemish)	ZEER GEHEIM	GEHEIM	VERTROUWELLJK	BEPERTKE VERSPREIDING
Bolivia	SUPERSECRETO or MUY SECRETO	SECRETO	CONFIDENCIAL	_____
Brazil	ULTRA SECRETO	SECRETO	CONFIDENCIAL	RESERVADO
Cambodia	TRES SECRET	SECRET	SECRET/CONFIDENTIEL	_____
Canada *	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED
Chile	SECRETO	SECRETO	RESERVADO	RESERVADO
Columbia (2 systems)	MUY SECRETO ESTRICTAMENTE RESERVADO	SECRETO SECRETO	CONFIDENCIAL RESERVADO	CONFIDENCIAL RESERVADO
Costa Rica	ALTO SECRETO	SECRETO	CONFIDENCIAL	_____

B, 1.

Country	TOP SECRET	SECRET	CONFIDENTIAL	_____
Denmark*	YDERST HEMMELIGT	HEMMELIGT	FORTROLIGT	TIL TJENESTE BRUG
Ecuador	SECRETISIMO	SECRETO	CONFIDENCIAL	RESERVADO
Egypt	TOP SECRET سري بلقوة	VERY SECRET سري جدّا	SECRET سري	OFFICIAL محصور
El Salvador	SECRETISIMO	SECRETO	CONFIDENCIAL	RESERVADO
Ethiopia	YEMIAZ BIRTOU MISTIR	MISTIR	KILKIL	_____
Finland	ERITTÄIN SALAINEN	SALAINEN	HENKILÖKOHTAINEN	VAINVIRKAPAL-VELUKSI-SSAKÄTETTÄVÄKSI
France*	TRES SECRET	SECRET	SECRET/CONFIDENTIEL	DIFFUSION RESTREINTE
Germany*	ŞTRENG GEHEIM	GEHEIM	VERTRAULICH	VS-NUR FÜR DEN DIENSTGEBRAUCH
Greece*	ΑΚΡΩΣ ΑΠΟΡΡΗΤΟΝ	ΑΠΟΡΡΗΤΟΝ	ΕΜΠΙΣΤΕΥΤΙΚΟΝ	ΠΕΡΙΩΡΙΣΜΕΝΗΣ ΧΡΗΣΕΩΣ
Guatemala	ALTO SECRETO	SECRETO	CONFIDENCIAL	RESERVADO
Haiti	_____	SECRET	CONFIDENTIAL	_____
Honduras	SUPER SECRETO	SECRETO	CONFIDENCIAL	RESERVADO
Hong Kong	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED
Hungary	SZIGORÚAN TITKOS	TITKOS	BIZALMAS	_____
India	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED

B, 2.

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Country	TOP SECRET	SECRET	CONFIDENTIAL	----------
Indonesia	SANGAT RAHASIA	RAHASIA	KEPERT JAJAAN	TERBATAS
Iran	BEKOLI SERRI	SERRI	KHEILI MAHRAMANEH	MAHRAMANEH
Iraq	سري بلقوة (Absolutely secret)	سري (Secret)	مكتوم	محدود (Limited)
Ireland Gaelic	TOP SECRET AN-SICREIDEACH	SECRET SICREIDEACH	CONFIDENTIAL RUNDA	RESTRICTED SRIANTA
Israel	SODI BEYOTER סודי ביותר	SODI סודי	SHAMUR שמור	MUGBAI מוגבל
Italy*	SEGRETISSIMO	SEGRETO	RISERVATISSIMO	RISERVATO
Japan	KIMITSU	GOKUHI	HI	TORIATSUKAICHUI
Jordan	مكتوم جدًا	سري	مكتوم	محدود
Korea	I급 비밀 ILKUP PIMIL	II급 비밀 IKUP PIMIL	III급 비밀 SAM KUP PIMIL	----------
Laos	TRES SECRET	SECRET	SECRET/CONFIDENTIEL	DIFFUSION RESTREINTE
Lebanon	TRES SECRET	SECRET	CONFIDENTIEL	----------
Mexico	SECRETO	SECRETO	CONFIDENCIAL	----------
Netherlands*	ZEER GEHEIM	GEHEIM	CONFIDENTIEEL or VERTROUWELLJK	DIENSTGEHEIM
New Zealand	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED

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Country	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED
Nicaragua	ALTO SECRETO	SECRETO	CONFIDENCIAL	RESERVADO
Norway *	STRENGT HEMMELIG	HEMMELIG	FORTROLIG	———
Pakistan	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED
Paraguay	ALTO SECRETO	SECRETO	CONFIDENCIAL	RESERVADO
Peru	ESTRICTAMENTE SECRETO	SECRETO	CONFIDENCIAL	RESERVADO
Philippines	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED
Portugal*	MUITO SECRETO	SECRETO	CONFIDENCIAL	RESERVADO
Spain	MAXIMO SECRETO	SECRETO	CONFIDENCIAL	DIFFUSSION LIMITADA
Sweden (Red Borders)	HEMLIG	HEMLIG	HEMLIG	HEMLIG
Switzerland	(3 languages; TOP SECRET has a registration number to distinguish from SECRET and CONFIDENTIAL)			
French	SECRET	SECRET	SECRET	RESERVE A L'USAGE EXCLUSIVE DU SERVICE
German	STRENG GEHEIM	GEHEIM	VERTRAULICH	NUR FÜR DIENST-LICHEN GEBRAUCH
Italian	SEGRETO	SEGRETO	SEGRETO	AD EXCLUSIVO USO DI SERVIZIO
Taiwan	CHÜEH TUI CHI MI	CHI CHI MI	CHI MI	MI
Turkey *	ÇOK GİZLİ	GİZLİ	ÖZEL	HIZMETE ÖZEL

Country	TOP SECRET	SECRET	CONFIDENTIAL	
Union of South Africa				
English	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED
Afrikaans	UITERS GEHEIM	GEHEIM	VERTROULIK	BEPERK
United Kingdom *	TOP SECRET	SECRET	CONFIDENTIAL	RESTRICTED
Uraguay	SECRETO	SECRETO	CONFIDENCIAL	RESERVADO
USSR	СОВЕРШЕННО СЕКРЕТНО	СЕКРЕТНО	НЕ ПОДЛЕЖАЩИЙ ОГЛАШЕНИЮ	ДЛЯ СЛУЖЕБНОГО ПОЛЬЗОВАНИЯ
Viet Nam				
French	TRES SECRET	SECRET	CONFIDENTIEL	CONFIDENTIEL
Vietnamese	TỐI-MẬT	MẬT	MẬT KIN	TU MẬT

NOTE: In all instances foreign security classification systems are not exactly parallel to the United States systems and exact equivalent classifications cannot be stated. The classifications given above represent the nearest comparable designations which are used to signify degrees of protection and control similar to those prescribed for the equivalent U.S. classifications.

* NATO RESTRICTED Notice A/94-N/23, 5 October 1960.

APPENDIX C

ORIGINAL CLASSIFICATION AUTHORITY
(See paragraph V, C.)

Part I. Original TOP SECRET Classification Authority

1. The Secretary and the Deputy Secretary of Defense; the Director of Defense Research and Engineering; the Assistant Secretaries of Defense; the General Counsel of the Department of Defense.

2. The Secretaries, Under Secretaries, Assistant Secretaries, and General Counsels of the Military Departments.

3. The Special Assistant and the Assistants to the Secretary of Defense; the Defense Representative, North Atlantic and Mediterranean Areas; the Chairman, Military Liaison Committee (AEC).

4. The Director and Deputy Directors of the Advanced Research Projects Agency; the Director and Executive Secretary of the Weapons System Evaluation Group.

5. The Chairman, Joint Chiefs of Staff; the Director, Joint Staff; the Secretary, Joint Staff; the Directors and Deputy Directors of the subordinate agencies of the Organization of the Joint Chiefs of Staff, as designated by the Chairman, Joint Chiefs of Staff; the commanders and deputy commanders of the unified and specified commands and the Chiefs of Staff of those commands.

6. The Director and Deputy Directors of the Defense Atomic Support Agency, the commanders and deputy commanders of DASA commands and facilities as designated by the Director, Defense Atomic Support Agency.

7. The Director and Deputy Directors of the Defense Communications Agency; the commanders and deputy commanders of Defense Communications Agency field activities, as designated by the Director, Defense Communications Agency.

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8. The Director, the Deputy Director, and the Chief of Staff of the Defense Intelligence Agency; and the chiefs of the principal staff elements of the Defense Intelligence Agency, as designated by the Director.

9. The Director and the Deputy Directors of the Defense Supply Agency.

10. The Director and Deputy Director of the National Security Agency; the chiefs of the military agencies under the operational control of the Director, National Security Agency; the chiefs of the principal National Security Agency staff elements as designated by the Director.

11. The Chiefs and Deputy or Vice Chiefs of the Military Services and, as specifically designated by the Chiefs of the Military Services concerned, the chiefs and deputy or vice chiefs of (1) their Headquarters staff elements; (2) the technical services, offices, and bureaus; and (3) the principal commands directly subordinate to the Headquarters staff elements. Such designations shall be dependent upon responsibilities of those services, offices, bureaus and commands for matters meeting the requirements for TOP SECRET classification in the fields of strategic and operational plans, intelligence operations and scientific and technical development.

12. The commanders and deputy or vice commanders and chiefs of staff of major field and fleet commands, forces or activities, as designated by the Chiefs of the Military Services or the commanders of the unified and specified commands concerned.

Part II. Original SECRET Classification Authority

Officials possessing original TOP SECRET classification authority and, in addition, such of their respective subordinate officials, as they may designate. Such designations shall be limited to officials whose responsibilities clearly demonstrate a real necessity for originating material which requires a SECRET classification.

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.47 - Ch 1	March 25, 1965	5200 series

ATTACHMENTS

Enclosure 3 to DoD Instruction 5210.47, Dec 31, 65

INSTRUCTIONS FOR RECIPIENTS

The following pen and page changes to DoD Instruction 5210.47, "Security Classification of Official Information," dated December 31, 1964, have been authorized, effective immediately:

PEN CHANGES

1. Instruction, Page 31, subsection XIV. B. - Delete: "5210.21"
   Insert: "C-5210.21"

   Changed portion is underscored.

2. Enclosure 2, Page B, 1., "Australia" - Delete "RESTRICTED"

PAGE CHANGES

Remove: Enclosure 3
Insert: Attached Enclosure 3

Changes appear on Page C, 1., and are indicated by marginal asterisks.

Maurice W. Roche

MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 62 106-1 PREVIOUS EDITIONS ARE OBSOLETE

APPENDIX C

ORIGINAL CLASSIFICATION AUTHORITY
(See paragraph V, A.)

Part I. Original TOP SECRET Classification Authority

1. The Secretary and the Deputy Secretary of Defense; the Director of Defense Research and Engineering; the Assistant Secretaries of Defense; the General Counsel of the Department of Defense.

2. The Secretaries, Under Secretaries, Assistant Secretaries, and General Counsels of the Military Departments; the Director of the Office of Civil Defense, Department of the Army.

3. The Special Assistant and the Assistants to the Secretary of Defense; the Defense Representative, North Atlantic and Mediterranean Areas; the Chairman, Military Liaison Committee (AEC).

4. The Director and Deputy Directors of the Advanced Research Projects Agency; the Director and Executive Secretary of the Weapons System Evaluation Group.

5. The Chairman, Joint Chiefs of Staff; the Director, Joint Staff; the Secretary, Joint Staff; the Directors and Deputy Directors of the subordinate agencies of the Organization of the Joint Chiefs of Staff, as designated by the Chairman, Joint Chiefs of Staff; the commanders and deputy commanders of the unified and specified commands and the Chiefs of Staff of those commands.

6. The Director and Deputy Directors of the Defense Atomic Support Agency, the commanders and deputy commanders of DASA commands and facilities as designated by the Director, Defense Atomic Support Agency.

7. The Director and Deputy Directors of the Defense Communications Agency; the commanders and deputy commanders of Defense Communications Agency field activities, as designated by the Director, Defense Communications Agency.

#First amendment (Ch 1, 3/25/65)

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.47 - Ch 2	June 22, 1965	5200 series

ATTACHMENTS

Enclosure 3 to DoD Instruction 5210.47, Dec 31, 64

INSTRUCTIONS FOR RECIPIENTS

The following page changes to DoD Instruction 5210.47, "Security Classification of Official Information," dated December 31, 1964, have been authorized:

PAGE CHANGES

Remove: Enclosure 3
Insert: Attached Enclosure 3

Changes appear on both pages and are indicated by marginal asterisks. Previous changes to Page C, 1. have been incorporated.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective July 1, 1965. Two (2) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Manpower) within sixty (60) days.

Maurice W. Roche
MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 62 106-1 PREVIOUS EDITIONS ARE OBSOLETE

APPENDIX C

ORIGINAL CLASSIFICATION AUTHORITY
(See paragraph V, A.)

Part I. Original TOP SECRET Classification Authority

1. The Secretary and the Deputy Secretary of Defense; the Director of Defense Research and Engineering; the Assistant Secretaries of Defense; the General Counsel of the Department of Defense.

2. The Secretaries, Under Secretaries, Assistant Secretaries, and General Counsels of the Military Departments; the Director of the Office of Civil Defense, Department of the Army.

3. The Special Assistant and the Assistants to the Secretary of Defense; the Defense Representative, North Atlantic and Mediterranean Areas; the Chairman, Military Liaison Committee (AEC).

4. The Director and Deputy Directors of the Advanced Research Projects Agency; the Director and Executive Secretary of the Weapons System Evaluation Group.

5. The Chairman, Joint Chiefs of Staff; the Director, Joint * Staff; the Secretary, Joint Chiefs of Staff; the Directors * and Deputy Directors of the subordinate agencies of the Organization of the Joint Chiefs of Staff, as designated by the Chairman, Joint Chiefs of Staff; the commanders and deputy commanders of the unified and specified commands and the Chiefs of Staff of those commands.

6. The Director and Deputy Directors of the Defense Atomic Support Agency, the commanders and deputy commanders of DASA commands and facilities as designated by the Director, Defense Atomic Support Agency.

7. The Director and Deputy Directors of the Defense Communications Agency; the commanders and deputy commanders of Defense Communications Agency field activities, as designated by the Director, Defense Communications Agency.

#Second amendment (Ch 2, 6/22/65)

8. The Director, the Deputy Director, and the Chief of Staff of the Defense Intelligence Agency; and the chiefs of the principal staff elements of the Defense Intelligence Agency, as designated by the Director.

9. The Director and the Deputy Directors of the Defense Supply Agency; the Director and the Deputy Director of the Defense Contract Audit Agency.

10. The Director and Deputy Director of the National Security Agency; the chiefs of the military agencies under the operational control of the Director, National Security Agency; the chiefs of the principal National Security Agency staff elements as designated by the Director.

11. The Chiefs and Deputy or Vice Chiefs of the Military Services and, as specifically designated by the Chiefs of the Military Services concerned, the chiefs and deputy or vice chiefs of (1) their Headquarters staff elements; (2) the technical services, offices, and bureaus; and (3) the principal commands directly subordinate to the Headquarters staff elements. Such designations shall be dependent upon responsibilities of those services, offices, bureaus and commands for matters meeting the requirements for TOP SECRET classification in the fields of strategic and operational plans, intelligence operations and scientific and technical development.

12. The commanders and deputy or vice commanders and chiefs of staff of major field and fleet commands, forces or activities, as designated by the Chiefs of the Military Services or the commanders of the unified and specified commands concerned.

Part II. Original SECRET Classification Authority

Officials possessing original TOP SECRET classification authority and, in addition, such of their respective subordinate officials, as they may designate. Such designations shall be limited to officials whose responsibilities clearly demonstrate a real necessity for originating material which requires a SECRET classification.

#First amendment (Ch 2, 6/22/65)

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.47 - Ch 3	July 28, 1966	5200 series

ATTACHMENTS

Pages i, ii, 11, 12, 17, 18, and 31 of DoD Instruction 5210.47, Dec 31, 64.

INSTRUCTIONS FOR RECIPIENTS

The following page and pen changes to DoD Instruction 5210.47, "Security Classification of Official Information," dated December 31, 1964, have been authorized:

PAGE CHANGES

Remove: Pages i & ii, 11 & 12, 17 & 18, and 31
Insert: Attached replacement pages.

Current changes appear on pages i, ii, 11, 17, 18, and 31, and are indicated by marginal asterisks. Previous change to page 31 has been incorporated.

PEN CHANGES

1. Page iii - Change section numbers XIII. and XIV. to "XIV." and "XV.".

2. Basic Instruction

Page 1, references: Insert "(h) OASD(M) multi-DoD memorandum, 'DoD Instruction 5210.47, Security Classification of Official Information,' January 27, 1965 (hereby cancelled)"

Page 9, footnote: Change "XIV. B." to "XV. B."

Changed portion is underscored.

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE DESTROYED.

SD FORM 1 JUL 56 106-1 PREVIOUS EDITIONS ARE OBSOLETE

NUMBER	DATE	DEPARTMENT OF DEFENSE DIRECTIVES SYSTEM TRANSMITTAL
5210.47 - Ch 3	July 28, 1966	

INSTRUCTIONS FOR RECIPIENTS *(Continued)*

PEN CHANGES

2. Basic Instruction (continued)

Pages 10, 29, and 30:

Change "ASD(M)," "Assistant Secretary of Defense (Manpower)," or "OASD(M)," appearing in paragraph V. A. 2., subsection IX. C., and subsection IX. G., to either "ASD(A)," "Assistant Secretary of Defense (Administration)," or "OASD(A)," whichever is appropriate.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Three (3) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Administration) within ninety (90) days.

Maurice W. Roche

MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

NUMBER 5210.47
DATE December 31, 1964#

Department of Defense Instruction

ASD(A) *

SUBJECT Security Classification of Official Information

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#First amendment (Ch 1, 7/28/66)

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3. Pursuant to SECTION 2 (a) of Executive Order 10501, as amended, original classification authority may be exercised by the following:

   a. For TOP SECRET - The officials designated in or pursuant to Part I of Appendix C.

   b. For SECRET - The officials designated in or pursuant to Parts I and II of Appendix C.

   c. For CONFIDENTIAL - The officials designated in or pursuant to Parts I and II of Appendix C, and such of their subordinates as they designate. To be so designated, a subordinate shall have duties, responsibilities and knowledge sufficient to assure objective and accurate evaluations and determinations.

4. Each component of the Department of Defense, the Office of the Assistant Secretary of Defense (Administration) acting for the Office of the Secretary of Defense, shall submit to
* the Assistant Secretary of Defense (Administration): *

   a. An initial report and all subsequent changes, listing by title the officials who have been designated to exercise original TOP SECRET classification authority.

   b. An initial report and all subsequent changes, showing the total number of officials who have been designated to exercise original SECRET classification authority.

* c. When request is made by the OASD(A), a report of * approximate numbers of individuals who have been designated to exercise original CONFIDENTIAL classification authority.

   d. Initial reports required under a. and b., above, shall be submitted within ninety (90) days after the effective date of this Instruction. Subsequent reports of changes shall be submitted with sufficient promptness to assure that the master lists are accurate to within twenty (20) days for TOP SECRET and six (6) months for SECRET original classification authority.

* e. The reporting requirement contained herein has been *
* assigned Report Control Symbol DD-A(AR)735. *

B. Derivative Classification

1. Derivative classification is involved when -

a. An item of information or collection of items is in substance the same as or closely related to other information with respect to which there is an outstanding proper classification determination of which the derivative classifier has knowledge and on which he is relying as his basis for classification; or

The information is created as a result of, in connection with, or in response to, other information dealing in substance with the same or closely related subject matter which has been and still is properly classified; or

c. The classification to be applied to the information has been determined by a higher authority and that classification determination is communicated to and acted upon by the derivative classifier.

2. Derivative classification is the responsibility of each person whose official duties require decision by him as to whether information contained in or revealed by material he prepares or produces requires classification under the circumstances stated in subparagraph 1, above, subject to the following general rules:

a. In the case of a document, the commander, supervisor, or other official whose signature or other form of approval is required before the document may be issued, transmitted or referred outside the office of origin, is responsible for the necessity, currency and accuracy of the derivative classification assigned to that document.

b. In the case of material other than a document, the commander, supervisor or other official in charge at the lowest operational level where the material is being produced is responsible for the necessity, currency, and accuracy of the derivative classification assigned to that material except that, by specific action, appropriate authority may place this

7. There is sound reason to believe that knowledge of the information would (a) provide a foreign nation with an insight into the war potential or the war or defense plans or posture of the United States; (b) allow a foreign nation to develop, improve or refine a similar item of war potential; (c) provide a foreign nation with a base upon which to develop effective countermeasures; (d) weaken or nullify the effectiveness of a defense or military plan, operation, project or activity which is vital to the national defense.

G. Classifying Research Data

Ordinarily, except for information which meets the definition of Restricted Data, basic scientific research or results thereof are not classified. However, classification would be appropriate if the information concerns an unusually significant scientific "breakthrough," and there is sound reason to believe it is not known or within the state-of-the-art of other nations, and it supplies the United States with a military or technological advantage. Classification also would be appropriate if the potential military or industrial application of the information, although not specifically visualized, would afford the United States a significant military or technological advantage in terms of technological lead time.

H. Effect of Open Publication

Appearance in the public domain, regardless of source or form, of information currently classified or being considered for classification does not preclude initial or continued classification; however, such disclosures require immediate re-evaluation of the information to determine whether the publication has so compromised the information that downgrading or declassification is warranted. Similar consideration must be given to related items of information in all programs, projects or items incorporating or pertaining to the compromised items of information. In these cases, if the release is shown to have been made or authorized by an official Government source, classification of clearly identified items may be no longer warranted. Classification should be continued until advised to the contrary by a competent Government authority. Questions on the propriety of continued classification should be referred to the office having prime responsibility over the subject matter or, if that office cannot be identified, to the Directorate for Classification Management, Office, Assistant Secretary of Defense (Administration).

I. Re-evaluation of Classification Because of Compromise or Possible Compromise

1. The original classifying authority, upon learning that a compromise or possible compromise of specific classified information has occurred, shall:

#First amendment (Ch 3, 7/28/66)

a. Re-evaluate the information involved and determine whether (1) the classification should be continued without changing the specific information involved; (2) the specific information, or parts thereof, should be modified to minimize or nullify the effects of the reported compromise and the classification retained; (3) immediate downgrading is appropriate; (4) the original schedule specified for downgrading the information involved should be changed to reflect an earlier downgrading time; or, (5) declassification is warranted.

b. When such determination is within categories (2), (3), (4), or (5) of paragraph 1. a., above, give prompt notice thereof to all holders of such information.

2. Upon learning that a compromise or possible compromise of specific classified information has occurred, any official having original classification jurisdiction over related information shall re-evaluate the related information and determine whether one of the courses of action enumerated in paragraph 1. a., above, should be taken or, in lieu thereof, upgrading of the related information is warranted. When such a determination is within categories (2), (3), (4), or (5) of paragraph 1. a., above, or that upgrading of the related item is warranted, prompt notice of the determination shall be given to all holders of the related information.

J. Classifying Material Other Than Documentation

Items of equipment or other physical objects may be classified only where classified information may be derived from them by visual observation of internal or external appearance, structure, operation, test, application or use. The overall classification assigned to equipment or physical objects shall be at least as high as the highest classification of any of the items of information revealed by the equipment or objects, but may be higher if the classifying authority determines that the sum of classified or unclassified information warrants such higher classification. In every instance where classification of an item of equipment or other physical object is determined to be warranted, such determination must be based on a finding that there is at least one aspect of the item or object which affords the United States a military or technological advantage. If mere knowledge of the existence of the item of equipment or physical object would compromise or nullify its military or technological advantage, its existence would warrant classification.

K. State-of-the-Art and Intelligence

Classification requires the consideration of the extent to which the same or similar information is known or is available to others. It is also important to consider whether it is known, publicly or internationally, that the United States has the information or even is interested in the subject matter. The state-of-the-art in other nations is a vital factor requiring consideration.

#First amendment (Ch 3, 7/28/66)

* XIII. CANCELLATIONS *

* Reference (h) and Report Control Symbol DD-M(AR)648 *
* are hereby superseded and cancelled. *

IMPLEMENTATION

This Instruction shall be implemented by the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, and the Defense Agencies. Two (2) copies of implementing instructions should be forwarded to the Assistant Secretary of Defense
* (Administration) within ninety (90) days. *

X` EFFECTIVE DATE

A. Except as stated in B. below, this Instruction is effective immediately.

B. Section IV, subparagraph E, 4, dealing with foreign RESTRICTED information, will be effective upon publication of appropriate changes to reference (d), providing instructions on safeguarding foreign RESTRICTED information, and to DoD Directive C-5210.21, Implementation of NATO Security Procedures.

Assistant Secretary of Defense
(Administration)

#Second amendment (Ch 3, 7/28/66)

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.47 - Ch 5	July 17, 1968	5200 series

ATTACHMENTS

Pages 27 and 28 of DoD Instruction 5210.47, Dec 31, 64.

INSTRUCTIONS FOR RECIPIENTS

The following page changes to DoD Instruction 5210.47, "Security Classification of Official Information," dated December 31, 1964, have been authorized:

PAGE CHANGES

Remove: Pages 27 and 28
Insert: Attached replacement pages.

Change appears on page 28 and is indicated by marginal asterisks.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Three (3) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Administration) within sixty (60) days.

Maurice W. Roche
MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

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The markings also will be inscribed at the top and bottom of each such document. Where the customary method of folding or rolling charts, maps or drawings would cover the classification markings, additional classification markings will be placed so as to be clearly visible when the document is folded or rolled.

6. Photographs and films, including negatives, and their containers shall be marked in such a manner as to assure that any recipient or viewer will know that classified information of a specified level of classification is involved.

7. Recordings, sound or electronic, shall contain at the beginning and end a statement of the assigned classification which will provide adequate assurance that any listener or receiver will know that classified information of a specified level of classification is involved. The recording material and containers also will be marked conspicuously.

8. A deck of classified accounting machine cards may be marked as one single classified document. A deck so marked shall be stored, transmitted, destroyed and otherwise handled in the manner prescribed for other classified documents of the same classification. An additional card shall be added, however, to identify the contents of the deck, the highest classification involved, and the downgrading/declassification grouping assigned to the deck. The individual cards of a deck marked as one single classified document, so long as they remain within the deck, need not be marked individually. Cards removed for separate processing or use, however, shall be protected to prevent compromise of any classified information contained therein, and for this purpose shall be marked individually, if necessary, as prescribed by subparagraphs 1. and 2., above.

9. Electrical machine and automatic data processing tapes will bear external markings and internal notations sufficient to assure that any recipient of the tapes, or of the classified information contained therein when reproduced by any medium, will know that classified

information of a specified level of classification is involved.

10. Classification markings on pages of listings produced on automatic data processing equipment may be applied by the equipment, provided the first and last pages of the listing and the front and back covers, if any, are marked as prescribed by subparagraphs 1. and 2., above. If individual pages are removed from the listing, each page so removed shall be marked as prescribed by subparagraphs 1. and 2., above.

11. Classified documents furnished to a DoD contractor, or to any other person or activity outside the Executive Branch, shall bear the notation: "This material contains information affecting the national defense of the United States within the meaning of the Espionage Laws (Title 18, U.S.C., Sections 793 and 794), the transmission or revelation of which in any manner to an unauthorized person is prohibited by law." (Section 5j, E. O. 10501)

12. Classified documents containing Restricted Data shall bear, for internal DoD use, the notation RESTRICTED DATA. When released outside the Department of Defense, such documents also shall bear the notation: "This document contains RESTRICTED DATA, Atomic Energy Act of 1954." (Section 5j, E. O. 10501)

13. Classified documents containing information identified as Formerly Restricted Data shall bear the notation: "FORMERLY RESTRICTED DATA - handle as Restricted Data in foreign dissemination -- Section 144b, Atomic Energy Act of 1954."

14. Classified messages shall be marked at the top and bottom with the assigned classification in the manner prescribed for unbound documents. In the case of a message printed by an automated system, these classification markings may be applied by that system, provided that the markings so applied are made clearly distinguishable on the face of the document from the printed text. In addition, the first item of information in the text of a classified message will be the security classification. The downgrading and declassification grouping notation applicable to a message will be placed at the end of the text.

#First amendment (Ch 5, 7/17/68)

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.47 - Ch 6	September 5, 1968	5200 series

ATTACHMENTS

Page 31 of DoD Instruction 5210.47, Dec 31, 64.

INSTRUCTIONS FOR RECIPIENTS

The following page and pen changes to DoD Instruction 5210.47, "Security Classification of Official Information," dated December 31, 1964, have been authorized:

PAGE CHANGE

Remove: Page 31
Insert: Attached replacement page on which change is indicated by marginal asterisks.

PEN CHANGES

1) Page 1 - Change the date of reference (d) to "July 10, 1968".

2) Pages 7 and 8, subsection IV. D. - Delete everything following the parenthetical phrase "(See Part III, Appendix A.)" on line 5.

The designation "CONFIDENTIAL MODIFIED HANDLING AUTHORIZED" has been abolished (see subsection IV. B. of DoD Directive 5200.1 (reference (d)), and documents implementing this change shall so specify.

3) Page 9, paragraph VI. E. 4. - Delete the asterisk on line 1 and the corresponding footnote.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Three (3) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Administration) within ninety (90) days.

Maurice W. Roche

MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 62 106-1 PREVIOUS EDITIONS ARE OBSOLETE

XII. CANCELLATIONS

Reference (h) and Report Control Symbol DD-M(AR)648 are hereby superseded and cancelled.

XIII. IMPLEMENTATION

This Instruction shall be implemented by the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, and the Defense Agencies. Two (2) copies of implementing instructions should be forwarded to the Assistant Secretary of Defense (Administration) within ninety (90) days.

XIV. EFFECTIVE DATE

* This Instruction is effective immediately. *

Adolph Horwitz
Assistant Secretary of Defense
(Administration)

#Fourth amendment (Ch 6, 9/5/68)

Mr. HORTON. You are familiar with Executive Order 10501 as amended. There was some discussion in answer to questions with the gentleman from New York, Mr. Reid, about the classifications. And you had some testimony with regard to that. I do want to point out that there is a loophole, if you want to call it that, with regard to classification, because it does say, "No other designation shall be used to classify defense information including military information, as requiring protection in the interests of national defense except as expressly provided by statute."

Then it goes on to set forth top secret, secret, and confidential.

So there can be other classifications if it is done by statute. Is that not correct?

Mr. FLORENCE. Yes, sir. I think immediately of the term "restricted data" which might fall within that other act of Congress.

Mr. HORTON. Just one other quick question. You have indicated that you would suggest that Executive Order 10501 be rescinded. But it seems to me that throughout the course of your testimony you have indicated that the provisions of that Executive order are good, they are valid, but that there has been a violation of the provisions of the order.

I am a little bit confused as to why you feel that the order should be rescinded. At that point, of course, there would not be anything to govern classification. So it seems to me there is some confusion with regard to your call for rescinding the order and your point that there has been violation of it.

I agree with you that based on the evidence that you have submitted to us it does appear there have been violations of it and perhaps it should be enforced more strongly. But I am somewhat confused about your idea of throwing the baby out with the bath water.

Mr. FLORENCE. Mr. Congressman, I regret that I have indicated that the Executive order might well remain and simply be improved. I do regret very much that I perhaps have not been capable of communicating what I really had in mind.

Of course, the Executive order could be a good tool for safeguarding the security interests of the United States. But I have attempted to make reference to the fact that in our human reactions and our human interests in exercising an authority for applying this Executive order, that it has not accomplished the purpose for which it was intended. It has created the opposite of a good purpose.

Mr. MOORHEAD. Mr. Alexander?

Mr. ALEXANDER. Thank you, Mr. Chairman.

Mr. Florence, thank you for a very informative statement. In deference to the late hour, I won't take too much time but I would like to clarify one matter.

On page 12, paragraph 3 of your statement, you stated that—I will paraphrase—I submit that the Department of Defense does about as much good as anyone could hope for when it comes to releasing information to the public regarding defense planning.

The public release machinery works very effectively in spite of the wierd confusion that exists in the classification system, you say.

Would you amplify on that statement, sir?

Mr. FLORENCE. Yes; if I may take just a moment, sir, in this way: What I have in mind here is the operational accomplishments of, say,

the Secretary of Defense in representing the executive department before the Congress. Of course, that means the people. But I am speaking of specific relationships that you know of yourself that go on day to day between the Department of Defense and the Congress.

In these relationships the Department of Defense in my opinion and in my knowledge through these many years, whether it is the present Department of Defense or previous ones, the Department does strive to present to the Congress all information necessary for the Congress and the people to enact legislation as is intended in our system.

Now, in exercising this responsibility I am referring to the fact that, thank God, the responsibility for properly communicating to the Congress is exercised in unquestionably a very good degree. But while it is being exercised as well as it is, by those responsible in the Department for exercising this communication responsibility, many, many other individuals in the Department of Defense are squelching the information from which the communications are being conducted.

The Department of Defense is still being encumbered by the entanglement of security classifications on documents which confuse individuals as to the information contained in them. We actually have two approaches of the type we are speaking of, Mr. Congressman. One is to serve the constitutional responsibility of the executive department to communicate with the Congress. But we also have the executive department, through the Department of Defense, withholding from the public the information that I am speaking about that could well be given out with no impact on the national defense whatsoever.

Mr. ALEXANDER. Are you saying, Mr. Florence, that the information is leaked out anyhow?

Mr. FLORENCE. Well, I don't consider the communication to the Congress that I am speaking of as a leak.

Mr. ALEXANDER. But from the standpoint of a classifier, and from the standpoint of one within the system of classification of security information, would you consider it a leak when the press publishes information that is classified?

Mr. FLORENCE. Yes, sir. And I wish, sir, to get your indulgence here. When you use the term classified, I hope you mean only the mark. I hope you don't mean the substance of the information.

Mr. ALEXANDER. I am talking about the procedural classification of data without regard to the substance.

Mr. FLORENCE. And may I back up now and get the thrust of your question, sir, because I think I wish to be real clear in my answer to it.

Mr. ALEXANDER. Well, I think I understand your answer. May I get your opinion on another matter? Mr. Reid a minute ago made reference to the Pentagon papers and you have stated that you have read the New York Times account of those papers as well as the Washington Post account.

Are you familiar with the allegations of the Justice Department that the publication of these papers would imperil national security?

Mr. FLORENCE. Yes, sir; however the version of that allegation may be stated. I am sure I understand the Congressman's intent and I believe I am quite familiar with the allegations.

Mr. ALEXANDER. You are familiar with that allegation?

Mr. FLORENCE. With the allegations of the U.S. Government in court.

Mr. ALEXANDER. What would be your reaction to those allegations?

Mr. FLORENCE. Sir, may I take just a moment. My reaction is that the Government's position is representative of an administrative approach within the Department of Defense which I have lived with for many years, that the publication of these papers goes contrary to someone's view of security.

In all sincerity, sir, I do not believe that there is any question of national security, in its true meaning, in the publication of these papers at all. And that is based on my experience of reviewing previous publications and helping in investigations of previous cases of somewhat this nature.

Mr. ALEXANDER. Thank you.

Mr. Chairman, I won't pursue it any further.

I yield the balance of my time.

Mr. MOORHEAD. Thank you. I have been advised that the Pentagon papers have still not come up to Capitol Hill from the office of the Secretary of Defense; they don't think they will come up before Monday.

Mr. McCloskey?

Mr. MCCLOSKEY. If that is the case, Mr. Chairman, perhaps I should go ahead and testify this afternoon. I had deferred my testimony on the basis that we would have those documents available to us.

Mr. Florence, I want to commend you for coming up here. Would you have dared do this prior to your retirement?

Mr. FLORENCE. Yes, sir.

Mr MCCLOSKEY. To your knowledge, is there anything in this Executive order that would prevent a member of the Defense Department from accurately and truthfully revealing classified information on the inquiry of an individual Congressman?

Mr. FLORENCE. I am very sorry, Mr. Congressman, the last part of your question I missed.

Mr. MCCLOSKEY. Is there anything about this Executive order or the practices of the Defense Department which would deny a member of the executive branch, such as yourself, to reveal classified information upon the inquiry of an individual Congressman?

Mr. FLORENCE. No, sir. I wish, Mr. Chairman, to take just a moment with that question. I have personally participated—I want to go back to some of the comments previously along this line.

I have personally participated in my function, while limited in the Air Force, to the development of what is the Department of Defense policy with regard to relationships with the Congress on disclosing information. As a matter of fact, I imagine I am the author of some of the language in the Department of Defense directive dealing with disclosure of information——

Mr. MCCLOSKEY. Can you identify that policy and memorandum for the record at this point, please?

Mr. FLORENCE. With your indulgence, sir; I would have to refresh my memory as to the specific designations now. I believe that Department of Defense Directive 5400.4——

Mr. MCCLOSKEY. Rather than take the time, may I ask unanimous consent for Mr. Florence to supply these documents at this point in the record identifying Defense Department policy with respect to discussions with Congressmen?

(The material referred to follows:)

February 20, 1971
NUMBER 5400.4

ATSD(LA)

Department of Defense Directive

SUBJECT Provision of Information to Congress

Refs: (a) DoD Directive 5122.5, "Assistant Secretary of Defense (Public Affairs)," July 10, 1961
(b) DoD Directive 5200.1, "Safeguarding Official Information in the Interests of the Defense of the United States," July 10, 1968
(c) DoD Directive 5400.7, "Availability to the Public of Department of Defense Information," June 23, 1967
(d) DoD Directive 5015.1, "Release and Authentication of Copies of Official Records," July 31, 1952
(e) DoD Instruction 5210.47, "Security Classification of Official Information," December 31, 1964
(f) DoD Directive 5500.1, "Preparation and Processing of Legislation, Executive Orders, Proclamations and Reports, and Comments Thereon," May 21, 1964
(g) DoD Directive 5148.5, "Assistant to the Secretary of Defense (Legislative Affairs)," November 13, 1961
(h) DoD Directive 5025.9, "Control and Protection of 'For Official Use Only' Information," February 1, 1968
(i) DoD Directive 5400.4, subject as above, December 24, 1966 (hereby cancelled)
(j) ASD(PA) Multi-Addressee Memorandum, "Security Review of Executive Session Congressional Testimony," January 6, 1967 (hereby cancelled)

I. REISSUANCE AND PURPOSE

This Directive reissues reference (i) to incorporate provisions of reference (j) and update Department of Defense policies and procedures governing furnishing information, both classified and unclassified, to Congress. References (i) and (j) are hereby superseded and cancelled.

II. APPLICABILITY AND SCOPE

A. The provisions of this Directive apply to the Military Departments, the Defense Agencies, the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Office of the Secretary of Defense (hereinafter referred to collectively as "DoD Components.")

B. Its provisions do not cover processing of legislation covered by DoD Directive 5500.1 (reference (f)), nor matters relating to appropriations which fall under the cognizance of the ASD (Comptroller), except as described in IV.B.1 and V.C., below.

III. POLICY

It is essential to the proper functioning of the United States Government that Congress receive adequate information concerning all Government programs and operations.

A. In accordance with the DoD policy of making maximum information concerning its operations and activities available to both Government officials and the public in general, all DoD Components will:

1. make maximum information available promptly to, and cooperate fully with Members of Congress and Congressional Committees and their staffs; and

2. answer constituents' letters to Members of Congress as fully as possible, subject to the following limitations and provision of subsection IV.C., below:

a. classification of official information in the interests of national defense, pursuant to Executive Order 10501 and the Atomic Energy Act, as amended (references (b) and (e)); and

b. restrictions on official information which, in the best interests of the public as a whole, should not be given general circulation (see DoD Directive 5400.7 and 5015.1 (references (c) and (d)).

B. Information not available to the public (see paragraph III.A.2., above) will be made available to Congress, in confidence, in accordance with paragraph IV.B.2., below.

5400.4 Feb 20, 71
(Att 2 to Encl 1)

CONGRESSIONAL TRANSCRIPT REVIEW	DATE

TO:

The attached transcript of testimony is forwarded for editorial and security review.

To meet committee requirements and allow time for final review by the Directorate for Security Review, OASD (PA), your action must be completed as indicated. Each element in the review process must give cooperative consideration to the time requirements of all elements in meeting due out dates.

1. NAME OF CONGRESSIONAL COMMITTEE	2. DATE OF HEARING	3. DATE ACTION MUST BE COMPLETED a. OFFICE/AGENCY _____ b. OASD(PA)DSR _____

4. MONITORING OFFICE		
a. ORGANIZATION	b. BUILDING AND ROOM NUMBER	c. TELEPHONE NUMBER

GUIDELINES

I. SECURITY

A. GENERAL - Review must be accomplished by officials competent to judge the security aspects of the subjects involved and to provide a consistent and defensible security position.

B. MARKING

1. Use black lead pencil.

2. Inclose with brackets [ ] information to be deleted.

3. Make deletions as limited as possible, considering whether the total context may contain clues to the information deleted.

II. EDITORIAL

A. GENERAL. Edit to correct inaccuracies.

B. MARKING

1. Use black lead pencil.

2. Line through all words or figures for which substitute language or figures are entered. Do not use brackets.

3. Print or write all entries legibly.

4. Use standard proofreaders markings.

5. Do not change statements by committee members. Note inaccuracies in the margin.

TO: Director
Security Review, OASD (PA)

FORWARDING CERTIFICATE

Date _____

Portions of the attached transcript which require deletion in the interests of national defense before publication have been bracketed. This action represents the considered judgment of this office that the information so marked warrants the protection of security classification.

SIGNATURE	OFFICE

DD FORM 1 JAN 71 1587

REPLACES DD FORM 1587, 1 JAN 67, WHICH IS OBSOLETE.

C. In no instance will information be furnished to Members of Congress regarding the identity or location of companies or persons receiving contract awards prior to public announcement of such information.

IV. FURNISHING INFORMATION TO CONGRESS

A. General

1. DoD personnel testifying as witnesses before Congressional Committees, or handling requests from Congress shall bear in mind the need to protect certain types of information from public disclosure (reference (b), (c), (d) and (e).

a. If the testimony is to be submitted in writing, it should contain an over-all classification to designate the security protection necessary (reference (e)).

b. If the testimony is to be given orally, the Congressional Committee concerned shall be advised, in advance, of the security classification and the need for protecting the sensitive portions from public disclosure.

2. Procedures of Congressional Committees with respect to preparation and delivery of prepared statements shall be complied with to the maximum extent possible. When a written statement is used by a DoD witness the statement will be submitted to the Committee in advance of the appearance as provided for by the rules of that Committee.

B. Security Procedures

1. To insure military security, testimony concerning classified information requiring security protection shall be given only in closed sessions. Transcripts of such testimony may be released for publication only after they have been reviewed and cleared by the Assistant Secretary of Defense (Public Affairs) or his designee and approved for release by the Chairman of the Congressional Committee which held the hearing.

a. All such transcripts shall be reviewed for security, proof read, and corrected by the witness prior to being forwarded to the OASD(PA).

b. Written statements prepared for formal presentation, budget justification books, and other material provided Congressional Committees which may be made a part of the published record of Congressional hearings, also require review by OASD(PA).

c. Supplementary, backup, and reference material provided to the Committees, which will not be made a part of the published record, or prepared for use by witnesses in responding to Members' questions, will not normally be submitted for review.

d. All DoD Components shall, on request, provide prompt and full guidance and assistance to the OASD(PA) in the review of material related to their spheres of responsibility.

e. Procedures for the security review of Congressional testimony are prescribed in enclosure 1.

2. In the rare case where there is a question as to whether particular information may be furnished to a Member or Committee of Congress, even in confidence, it will normally be possible to satisfy the request through some alternate means acceptable to both the requester and the DoD. In the event that an alternate reply is not acceptable, no final refusal to furnish such information to a Member of Congress shall be made, except with the express approval of the Head of the DoD Component concerned, or of the Secretary of Defense. The Assistant to the Secretary of Defense (Legislative Affairs) shall be informed of any such submissions to the Head of a DoD Component or to the Secretary of Defense. A final refusal to a Committee of Congress may be made only with the concurrence of the Assistant to the Secretary of Defense (Legislative Affairs), who shall be responsible for insuring compliance with all procedural requirements imposed by the President or pursuant to his direction.

C. Information Requested for Constituents. Information requested by Members of Congress for their constituents shall be tested for limitations on dissemination (see paragraph III.A.2., above) and handled in the same manner as if the constituent himself had written directly to the DoD; if it

develops that the information cannot be released the Member requesting the information shall be advised promptly of that fact and of the reasons for the determination.

D. Congressional Investigations

1. The Assistant to the Secretary of Defense (Legislative Affairs) has been assigned over-all responsibility (reference (g)) for assuring compliance with the policies and procedures governing legislative investigations of DoD activities, including liaison with Congress, and, in connection therewith, keeping appropriate DoD personnel currently informed on the status of such investigations (except for those affecting budgets and appropriations, and related to financial matters).

2. DoD Components shall furnish information copies of all direct written communications to and from Congress with respect to such investigations to the ATSD(LA).

V. HANDLING OF CONGRESSIONAL REQUESTS

A. General

1. Replies to all Congressional inquiries and requests shall be completely responsive and handled as expeditiously as possible. Should it become evident that a response to a request will be unduly delayed an interim reply should be made. The interim reply will indicate the anticipated date of completion and the steps being taken to obtain the information requested.

2. To facilitate prompt and adequate response to Congressional requests, it is preferred that the requests be written and specify in detail the particular information or documents desired. However, oral requests which are sufficiently specific to permit prompt and adequate response should be accepted.

3. A Congressional request for correspondence between the Department of Defense and a Congressman shall be referred to the concerned member or Committee.

B. Written Requests Addressed to the Secretary of Defense or Deputy Secretary of Defense. Complete replies to Congressional correspondence addressed to the Secretary of Defense or Deputy Secretary of Defense shall be provided within five (5) working days of their receipt whenever possible; those

of an urgent nature shall be answered more expeditiously, as appropriate.

1. If the information requested is not readily accessible or of such volume or complexity as to prohibit preparation of a complete reply within the five-day time limit, the requester shall be advised, via an immediate interim reply, of a date by which the information will be supplied.

2. The Assistant Secretary of Defense (Administration), or his designee for the purpose shall be provided with the estimated completion date and an adequate explanation of the delay.

C. Public Releases. Replies to Congressional inquiries or requests or other transmittals which may result in release of information of significant public affairs implication will be coordinated in advance with OASD(PA) as required by DoD Directive 5122.5 (reference (a)).

VI. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Two (2) copies of implementing documents shall be forwarded to the Assistant Secretary of Defense (Public Affairs) and Assistant to the Secretary of Defense (Legislative Affairs) within sixty (60) days.

Deputy Secretary of Defense

Enclosure - 1
Procedures for Security Review
of Congressional Testimony

PROCEDURES FOR

SECURITY REVIEW OF CONGRESSIONAL TESTIMONY

I. GENERAL

The following uniform procedures supplement guidance outlined in IV. B. of the basic Directive governing the review of prepared statements and budget justification material to be presented to Congressional Committees, transcripts of testimony given in executive session before such Committees, and supplemental information prepared for insertion in the hearing record.

II. DEFINITIONS

As used in this Directive, the following definitions apply:

A. Prepared Statement. A statement, including supplemental material, prepared by a DoD witness for presentation to a Congressional Committee in open or executive session.

B. Executive Session Testimony. Testimony taken in closed Congressional hearings, transcripts of which may contain information requiring the protection of a security classification.

C. Inserts. Amplifying and/or supplemental information prepared by DoD and intended for inclusion in the record of Congressional hearings.

D. Budget Justification Books. Material prepared by DoD at the direction of and in the format prescribed by Congressional Committees to explain and justify in detail the estimates contained in DoD budgets. This material includes: (1) justification books for each appropriation title (Justification of Estimates for FY___); (2) Supporting Data for FY___ Budget Estimates - Exhibit P-1; (3) Supporting Data for FY___ Budget Estimates - Descriptive Summaries; (4) Supporting Data for FY___ Budget Estimates - Major Programs; (5) other material as prescribed for submission by Congressional Committees prior to commencement of hearings.

III. PROCEDURES

A. Prepared Statements. Prepared statements will be submitted in quadruplicate to the Directorate for Security Review, OASD(PA), as far in advance of the required date of transmittal to a Congressional Committee as possible, normally five (5) or more working days prior to the date clearance is desired. While there will be cases in which this time limit cannot be met, exceptions must be limited to true emergencies. DD Form 1790 (Attachment 1) will be used to forward statements for review. The form will be signed by an official authorized by the Secretaries of the military departments or the heads of OSD offices and Defense agencies to certify to the security and policy positions presented.

B. Transcripts. Following testimony by DoD witnesses before a Congressional Committee in executive session, the Committee will normally provide appropriate DoD Component offices with a stenographic transcript of the testimony to permit (a) incorporation of necessary editorial corrections, (b) insertion of requested additional information as inserts to the record, and (c) deletion of security information if open publication is contemplated. Such transcripts are generally furnished to the Assistant Secretary of Defense (Comptroller), the Assistant to the Secretary of Defense (Legislative Affairs), the Assistant Secretary of Defense (International Security Affairs) or the appropriate military department, depending on the Congressional Committee and the organizational affiliation of the witness. Strict time limits are normally imposed for return of the transcripts. Expeditious handling of transcripts will be accomplished as follows:

1. Monitoring

a. The Office of the Assistant Secretary of Defense (Comptroller), the Office of the Assistant to the Secretary of Defense (Legislative Affairs), the Office of the Assistant Secretary of Defense (International Security Affairs), or the office delegated this responsibility by the Secretary of a military department, as appropriate, will be responsible for monitoring the status of the transcript during the review process and insuring that suspense dates are met.

b. The monitoring office will complete and attach

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DD Form 1587 (Attachment 2) to the transcript, determine suspense dates (alloting two-thirds of the available time for editing and preliminary security review and one-third for final action by the Directorate for Security Review), and forward the transcript to the parent office of the witness for preliminary review.

2. Editing

a. Editing by witnesses will normally involve changes of language or punctuation designed to correct obvious mistakes in facts or numbers.

b. Material to be deleted for editorial reasons will be lined out rather than bracketed. (Brackets are reserved for security deletions, see 3., below).

c. Editing will be entered legibly in ordinary black lead pencil.

3. Security Review

a. Information which warrants the protection of a security classification under the provisions of DoD Directive 5200.1 (reference (b)) will be marked for deletion by brackets[ ]with ordinary black lead pencil.

b. Security deletions must be as specific as possible -- for example, classified numbers will be deleted rather than the sentence or paragraph in which they appear.

c. If an entire passage is considered to require deletion, the brackets will clearly indicate the extent of the deletion. Information marked for deletion from executive session transcripts must reflect a consistent and defensible security position.

d. Bridging of deletions with substitute unclassified language is not necessary.

4. Final Review and Clearance

a. Immediately upon completion of editing and preliminary

security review, the monitoring office will insure that the transcript together with two copies of the related DD Form 1587 (Attachment 2) are forwarded to the Directorate for Security Review, Office of the Assistant Secretary of Defense (Public Affairs), for final review and clearance.

b. The Directorate for Security Review will make final security determinations using red pencil markings and return the transcript to the submitting office for processing in accordance with the individual requirements of the Committee concerned, including any required excision of classified material. Some Committees furnish two copies of a transcript, both of which must be returned to the Committees -- one a printer's copy excised of all classified material, the other a Committee file copy with the classified areas indicated with red pencil brackets. Completed transcripts will normally be returned to Committees through appropriate monitoring offices.

C. Inserts. All information prepared for insertion as a part of the official record of open and executive session testimony will be given preliminary review as outlined in subsection III. B. 3., above, and submitted to the Directorate for Security Review for final review.

1. Whenever possible, inserts will be placed in executive session transcripts before submission to the Directorate for Security Review.

2. When inserts are not submitted with transcripts, two (2) copies will be marked to indicate transcript page location and transmitted by DD Form 1790 (Attachment 1) certified as indicated in subsection A., above.

3. Insert material will not be forwarded to a Congressional Committee without review by the Directorate for Security Review.

4. Where required, excising of security material from inserts will be accomplished as prescribed for transcripts in subsection III. B. 4. b., above prior to their delivery to the Committee.

D. Budget Justification Books. Budget justification books prepared for submission to Congressional Committees will be submitted in duplicate to the Directorate for Security Review, OASD(PA), as far as possible in advance of the date clearance is desired, but at least five (5) working days prior to that date. Information which warrants the protection of a security classification will be bracketed by ordinary black lead pencil as indicated in subsection B.3., above. DD Form 1790 (Attachment 1), certified as indicated in subsection A., above, will be used as a transmittal.

E. Designation of "For Official Use Only" Material. Under the provisions of paragraph III.C.3., DoD Directive 5025.9 (reference (h)), the portions of material submitted for review which qualify for the marking "For Official Use Only" must be so designated and accompanied by an explanation of the rationale for such finding in accordance with Section VIII, "Exemptions," of DoD Directive 5400.7 (reference (c)). Following review, the office transmitting such material to Congress will be responsible for providing the recipient with an appropriate explanation as to the significance of the term "For Official Use Only" as specified in DoD Directive 5025.9 (reference (h)).

F. Release of Information. Information presented in hearings may not be released to the public until released by the Congressional Committee or with permission of the Committee. The importance of maintaining the confidence of Congress in this regard cannot be overemphasized.

Attachments - 2
1. DD Form 1790
2. DD Form 1587

5400.4 Feb 20, 71
(Att 1 to Encl 1)

PREPARED TESTIMONY REVIEW

TO: DIRECTOR, SECURITY REVIEW, OASD(PA)	DATE

The attached document is forwarded for review in accordance with paragraph IV.B.1.b., DoD Directive 5400.4.

DESCRIPTION OF DOCUMENT *(Enter statement, budget justification book, insert(s) at page(s), etc.)*

WITNESS

COMMITTEE/SUBCOMMITTEE

HEARING DATE AND SUBJECT

PAGE COUNT	THIS DOCUMENT IS FOR ☐ CLASSIFIED ☐ UNCLASSIFIED PRESENTATION *(Check applicable term)*

UPON COMPLETION NOTIFY *(Name, agency and telephone number)*

DIRECT QUESTIONS TO *(Name, agency and telephone number)*

REQUEST CLEARANCE NLT *(Date)*

The attached material has department/agency approval for the purpose specified. Any portions requiring security protection have been appropriately designated.

ATTACHMENT	SIGNATURE

DD FORM 1 JAN 71 1790

Mr. FLORENCE. I would be happy to, sir.

This policy I am speaking of which the Department of Defense has prescribed, and I believe does follow to the letter, provides for furnishing the Congress with any and all information the Congress believes is necessary for legislative purposes. However, there is a procedure, as we all know, that is involved in the status of secrecy in which that information may be revealed to the Members of Congress or committees of Congress.

I make this distinction because as we all here might know, and I am not talking about how some individual may implement the policy, but the Department of Defense policy is that there is no restriction against communicating with the Congress, provided that in certain communications there are the closed doors and the elimination of all of the wonderful people who might wish to participate in the work.

Mr. MCCLOSKEY. I have a letter dated June 11 from Special Assistant Secretary of Defense Dennis Doolin, who furnished an affidavit in one of the recent newspaper cases, stating to me it would not be useful to give me photographs of certain villages in Laos.

Can you tell me on what basis he would decline to furnish photographs of villages in Laos, or where villages used to be?

Mr. FLORENCE. I certainly could not imagine any basis whatsoever. Even with the existence of some factor of personal identity of an individual in those photographs who someone may believe should not have been there that day, or whatever there was in the mind of the individual who said no, there is this Department of Defense directive that the Congressman and I referred to a moment ago that provides for secrecy between the Department of Defense and the Congress for the protection of whatever is in that photograph.

Mr. MCCLOSKEY. Now let me switch my question for a moment to this Executive order with which you have been so familiar. To your knowledge, Mr. Florence, is the violation of an Executive order, such as 10501, a crime?

Mr. FLORENCE. Not of the order, sir. Now, what is represented in the record as having been violated may be a very serious crime if I may make the distinction, sir.

Mr. MCCLOSKEY. Yes, you may. Please do.

Mr. FLORENCE. The espionage statutes are the first category of legislation that comes to my mind. There is some parallel between the espionage statute restrictions and criminal provisions for communicating information affecting the national defense, but if I may interject, no relationship to classification. There is quite some penalty for communicating information affecting the national defense to people outside the United States, where the communication is to the injury of the United States. Of course, I am not reading exactly, but I believe I am communicating the true sense of the statute.

Mr. MCCLOSKEY. Let me make my inquiry specific. As I understand it, the Espionage Act, which appears in title 18 of the United States Code, makes it a crime to intentionally injure the United States or to assist a foreign nation by the disclosure of information relevant to the national defense. And I understand the specific provisions of section 798 of title 18 which refer to classified information with respect to communication, intelligence, or cryptography, and making the revelation of those facts are a crime under the code. But I am wondering, if,

absent meeting the definition of the Espionage Act, section 793 of the code, is it any crime, for example, for someone over in the Defense Department to copy a confidential document or a secret document and turn that over to the newspapers?

Mr. FLORENCE. To my knowledge, the Congressman is referring to an administrative matter that is prohibited by the application of Executive order——

Mr. MCCLOSKY. The Executive order says it can't be done. But is it a crime to do it?

Mr. FLORENCE. I am attempting to make a distinction between the violation of an administrative action as opposed to violation of law. I have no compunction whatever about advising, in my opinion, based on these many years of experience, service, and effort within the Department of Defense, there is no law that would apply to make it a crime for me to communicate to you information in a document bearing these markings, top secret, secret, or confidential, standing alone, sir, depending on the contents. But, if the intent was to do injury to the United States, I might have to qualify the comment.

Mr. MCCLOSKEY. If you were violating Espionage Act, and you had the intent to aid a foreign government or to hurt the United States, but you did this in the belief that you were helping the United States by revealing, to the Congress or to the newspapers, information that was improperly classified or long since should have been declassified, you would not be committing a crime. Is my understanding correct?

Mr. FLORENCE. That is the conclusion that I have reached, sir. No crime whatsoever.

Mr. MCCLOSKEY. Now, Mr. Florence, you mentioned in your statement that from your knowledge and experience men who had declassified information had been dealt with roughly. Can you amplify this comment?

Mr. FLORENCE. I am very sorry, sir, the first part of your question, may I have it again?

Mr. MCCLOSKEY. In your statement you refer to the fact that people who declassified information had sometimes been dealt with roughly. Can you amplify that?

Mr. FLORENCE. Let's be sure we are together on what we are talking about. My statement refers to the action where an individual communicates information which he knows to be unclassified, which he knows does not bear an assigned classification, this is what I referred to in the latter part of my discussion. And if the individual, who is certain in his mind, even to the point that the information has already been determined to be unclassified, communicates that information against the views of some superior authority, that individual is in trouble.

Mr. MCCLOSKEY When you say "in trouble," have you ever known any people in the Defense Department that were criminally prosecuted as a result of revealing classified information?

Mr. FLORENCE. Sir, I am sorry that I cannot answer that question categorically "yes" or "no" because of the term "criminally prosecuted." I simply can't recall cases immediately that would fall within the term criminally prosecuted. I believe you mentioned the Department of Defense? Of course, we could go back to the cases immediately after World War II, to the individuals who communicated atomic

energy type information, to those prosecutions. Perhaps you are not referring to that type of case. I am not being very specific, I know.

Mr. McCloskey. I am not concerned now about violations of the Espionage Act, where somebody spied and tried to turn something over to a foreign government. What I am speaking about is something that is fairly commonplace in the Defense Department, isn't it, where some superior becomes concerned that a subordinate has disclosed classified information or has declassified information or has downgraded something the superior felt should be more highly classified. This happens fairly frequently, does it not?

Mr. Florence. The so-called leakages occur very frequently.

Mr. McCloskey. Do you know of any criminal prosecution in the last 15 years for allegedly leaking information?

Mr. Florence. Sir, if I do, it does not come to my mind immediately. But because I can't recall specifically for this body I am speaking to doesn't mean there hasn't been.

Mr. McCloskey. Do you recall any administrative treatment that was rough on someone who allegedly declassified something or leaked classified materials?

Mr. Florence. Yes, sir; I recall.

Mr. McCloskey. Administrative action?

Mr. Florence. Yes, sir; very definitely, sir.

Mr. McCloskey. Now, Mr. Florence, to your knowledge, have there been any decisions made in the Department of Defense by someone to reveal classified information for the purposes of legislative advocacy? In other words, to your knowledge in the past 15 years have there been any instances where a given Defense Department official might make something public, either to the press or to the Congress, to obtain the enactment of a law or a specific appropriation?

Mr. Florence. Mr. Congressman, let me divide that question two ways. First, as I referred to in my prepared comments, the Department of Defense actually does a very good job in communicating with the Congress, perhaps in closed sessions of committees, but they do communicate with the Congress quite well. The assignment of security classification or defense classifications really does not impair very much the communication with the Congress through the established channels.

Mr. McCloskey. When you say that, aren't you saying then that people in the Defense Department selectively take some classified information and convey it to the Congress for the purposes of passing legislation?

Mr. Florence. Very definitely, sir.

Mr. McCloskey. Do they not also do this with the press for the same purpose of building public opinion in favor of proposed legislation that the Armed Services determine beneficial to the national interest?

Mr. Florence. I personally, Mr. Congressman, do not have knowledge of an act where there was a communication by an individual to a member of the press, of information that the Department of Defense officially communicated as unclassified but retained the classification after communicating it. I personally don't know this. I am sure it has happened, because I have seen the results of it.

Mr. McCloskey. I have run out of time, Mr. Florence.

Thank you very much for testifying. I commend you highly for your willingness to do this and I hope you will furnish us those documents, the specific memorandums to which you referred, because they are very important at this point in the record and the sooner we have them, I think the better.

Mr. FLORENCE. Thank you very much, sir.

Mr. MOORHEAD. Mr. Florence, suppose an individual comes into possession of a document marked "secret" or something like that and it just seems ridiculous. Is there any independent board or commission to which that individual could appeal for reclassification? I am thinking not of a person in the Defense Establishment, but someone outside?

Mr. FLORENCE. Someone outside the Defense Establishment coming into possession of a document with these alleged security classification marking on them? The individual, of course, may go into the Department of Defense. Normally the entry would be through the public relations office, which receives individuals for all purposes, and ask whatever questions he may wish to ask about what these markings mean and what should he do, or anything of that sort, sir.

Mr. MOORHEAD. But there is no appeal machinery setup, there is no independent commission to do this? Mr. Florence, is there any catalog listing all of the documents classified as top secret?

Mr. FLORENCE. No, sir; there is not.

Mr. MOORHEAD. Thank you, Mr. Florence.

Mr. Reid.

Mr. REID. Thank you, Mr. Chairman.

Mr. Florence, I would like to ask you one basic question, if I may, on premise and philosophy. Do you feel that in the main the officers you have dealt with in the Defense Department and the Air Force have been animated with a timely sense of accountability, timely sense of accountability to the Congress and the American people in the sense that they would try to make an affirmative determination to present the Congress in particular with essential material relative to the national defense and that they made a positive effort in this regard, or did you feel on the contrary that they would at times in the absence of Executive direction to the contrary, if it existed, attempt to conceal or deceive or not to take a chance or to play it safe on the assumption that what the Congress didn't learn wouldn't hurt them?

Mr. FLORENCE. Sir, I would like to answer that in two parts also because you have given two parts. The first part—may I have the sense of the question on the first part?

Mr. REID. The sense is whether there is a positive animation to give to the American people and the Congress the material that would represent fair accountability on major decisions and material that was central to policy judgments by the Congress and the American people in the great decisions? Or was there in turn a failure to present basic information and a tendency to play it safe rather than affirmative feelings that the Congress was entitled to basic information and that it was part of the function of the Executive to understand that they had a sense of accountability to the Congress and the American people?

Mr. FLORENCE. Mr. Congressman, the answer to that question is in this way. My personal experience of Secretaries of the Air Force and to some degree the Secretaries of Defense, since they have been in the

positions, is that every one of them, whichever name we are going to use, I would perhaps have personal reason to recall his dedication to furnishing the Congress everything in the way of substantive information and related information necessary for communication between the Department and the Congress for the Congress to perform its functions. I am speaking most emphatically that I have never heard of an instance where the officials that we are referring to have felt that there was any division between the legislative branch and the performance of his function in free communication.

Now, in the lower levels, Mr. Congressman, the practical effect of communication with the Congress is not anywhere near that complete. There is definitely a sense of division at the lower levels, many of the lower levels within the Department of Defense and the Congress on what the Congress might need in the way of performing its function.

I don't mean now to imply that there are a great many people less than the Secretary of Defense who actively strive to withhold information. I am attempting to describe the situation where there are many individuals within my own personal relationships when I was in the Department of Defense who were not as wholehearted in communicating with the Congress as perhaps would have been better in the interests of the country.

Mr. REID. If you were a junior officer, or indeed junior flag officer, would you be inclined to follow the practice of minimum classification or would you be inclined to follow a practice of overclassification, if there was a choice, on the theory that you could be called, to use your language, before superior officers and perhaps encounter fairly rough going, if you had not classified sufficiently?

Mr. FLORENCE. I believe I understand completely the question the Congressman has asked and I will answer it in that sense. In today's orientation, throughout the Department of Defense, and specifically in the military service, the tendency, by nature of the existence of the authority to do so, is to exercise authority for designating something as classified. There is the tendency for the individual to impose a feeling of security control, over what he is attempting to do in the performance of his functions.

Mr. REID. Were you ever a participant in discussions wherein the subject of whether material should be forwarded to the Congress or not was part of the conversation?

Mr. FLORENCE. I believe, to be completely truthful and not try and recall exceptions, most of my relationships with other individuals in the Department of Defense on that matter has been limited to policy, That is, to the issuance of directives such as I mentioned a while ago in the Department of Defense relating to this matter. My efforts have contributed to assuring that the directives themselves did not inhibit complete communication between the Department of Defense and the Congress.

Mr. REID. Thank you, Mr. Florence, I think your testimony has been excellent and most helpful to the committee.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Horton.

Mr. HORTON. Mr. Florence, I, too, want to thank you for coming up and discussing with us this matter of classification, overclassification, and the need for declassification. You did testify earlier that

you had read the papers that were printed in the New York Times. Do you know of your own knowledge whether in fact the published documents are classified?

Mr. FLORENCE. Mr. Congressman, may I make a distinction between how much reading of the articles in the New York Times as opposed to the articles in the Washington Post I engaged in? I am not completely familiar with all of the issuances in the New York Times, although I read some of them. But in answer to—may I have the question again, sir, please?

Mr. HORTON. The question I asked is do you know—let me add to it now, the New York Times and the Washington Post, do you know whether in fact the documents that were published in these two papers are classified?

Mr. FLORENCE. I have not seen the documents as to their marking. I have knowledge of course——

Mr. HORTON. You have not see the documents?

Mr. FLORENCE. No, sir.

Mr. HORTON. I am just asking of your own knowledge.

Mr. FLORENCE. I have not seen the documents. I have seen only those portions published in the papers, sir.

Mr. HORTON. I am not asking you to classify them. I am asking you whether or not you know them to be classified?

Mr. FLORENCE. No, sir, I do not.

Mr. HORTON. You do not know?

Mr. FLORENCE. I know only what has been published about them in the papers, sir.

Mr. HORTON. Are you aware of any documents that are not published in that 47 volumes? Have you seen the 47 volumes?

Mr. FLORENCE. I have not, sir. My comments about them are limited to what is in the paper.

Mr. HORTON. I see. Thank you.

Mr. MOORHEAD. Thank you very much, Mr. Florence, we appreciate your testimony and the public session of the subcommittee will stand in recess until 2 o'clock this afternoon, at which time we will hear testimony from several Members of Congress.

(Whereupon, at 12:20 p.m., the hearing was recessed, to reconvene at 2 p.m., the same day.)

AFTERNOON SESSION

Mr. ALEXANDER (presiding). The meeting will come to order.

Mr. Moorhead asked me to preside in his absence. He will be delayed for a few minutes due to a meeting he is having now with the Speaker of the House.

The next witness to come before the committee is Congressman Sam Gibbons of Florida.

Congressman, we will be glad to receive your testimony.

STATEMENT OF HON. SAM M. GIBBONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. GIBBONS. Thank you, Chairman Alexander.

I appreciate the opportunity to come here. Let me say in the beginning I applaud what this committee is doing. If I have any condemna-

tion, it is because you did not do it sooner. I want to applaud not only the subject matter of this hearing, but the manner in which it is being conducted.

As you recall, during last year's reorganization hearings we tried in many different ways to remove some of the secrecy that infects Congress and we were successful. This hearing today is one of the types of hearings that we envisioned. Other reforms which were adopted, such as the recorded tellers, and the committee reports reflecting how the committee members voted, are all steps in the direction to remove secrecy. I applaud what you as an individual committee are doing here today.

I applaud it too because you have gotten down to the very guts and the heart and soul of our system. As I understand our system, and as I am sure you understand it, we derive all of our just powers from the consent of the governed, and how can it be said that the consent of the governed has been given when the governed have been mislead, have not been fully informed, and in effect have been lied to in this governmental process?

It is absolutely essential that this subcommittee and that this Congress pull off the cloak of secrecy that has been unnecessarily thrown upon these Vietnam papers. What you are doing today is most important.

Mr. Chairman, I have a formal statement. I would like to enter it into the record at the end of my testimony and I would like to summarize it as best I can here in an informal fashion.

Mr. ALEXANDER. Without objection, it will be admitted.

Mr. GIBBONS. As I said, what you are doing today goes to the very essence of our Government. Freedom of the press and freedom of speech goes much deeper than a license to express an opinion. Really, this freedom is much deeper than that. It is based upon the concept that a person cannot give his consent to be governed unless that person is fully informed about the facts on which he has to make a decision, the facts upon which he must cast his ballot, and, therefore, Mr. Chairman, what you are doing today goes to the very essence of our society, the very essence of our Government, and it is something that I hope this committee will fight for.

Not only are we as Members of Congress entitled to see the history that has been compiled in these documents, but every American as a citizen is entitled to see what is in these documents. From all that I have been able to ascertain from the little that has been already disclosed, these are historical documents, not documents that would telegraph to the enemy any future plans that we have, contingency plans, things of that sort. In fact, I have a suspicion, Mr. Chairman, that the enemy knows far more about most of this situation than do many members of the American public, including many of us here in Congress.

I have been troubled with this problem of secrecy for a long time. I know of the distinguished work that Mr. Moss and the subcommittee then did about removing some of the troublesome classification problems that arose in the past over the invocation of executive privilege and over the very vague laws that we find in chapter 18 of the United States Code dealing with espionage, and with censorship.

I think this is the time for the Congress to reexamine those laws in light of the deception that apparently has been practiced upon the Congress and upon the public by the decisions of prior administrations. It is troublesome that many of us here in this room would have known the members who were intimately involved or known the people who were intimately involved in these decisions and would have had conferences here in this building and in the other buildings with these people. And one cannot pick up the excerpts from the Vietnam papers today without feeling that he has been at least at the slightest misled and at the worst lied to about the contents that those papers disclosed.

A year or so ago, along with Congressman Addabbo and many other Members of Congress, I introduced a joint resolution to provide for the declassification of many documents. I think that this is an area in which Congress must take a more active role.

I want to make some informal suggestions now as to what I think needs to be done. One of the things that I think should be done is make some kind of inventory, at least by volume, of the amount of documents that have been classified and that are classified by each department each year and that annually the department should publish the number of documents that are classified and the number of documents that it has classified and the length of time numbers of documents have been classified.

You know, it is almost impossible for Members of Congress to comprehend the depth of the classification procedure that we have allowed to grow up under executive privilege. I was astounded to read the other day in the Washington Post where an operation that I had participated in, Operation Keelhaul, in 1945 over in Germany was still a classified secret.

Now, I want to say that when I participated in it I did not realize it was a classified secret. I am sure that all of the people who participated in it knew a lot about it. We were involved in the process of what turned out to be the forceable repatriation of what we thought were Soviet citizens to the other side of the Iron Curtain. We were soldiers; we were ordered to do this; we thought we were liberating these people. We found, to our dismay, that many of them did not want to go back and they had pretty legitimate reasons for not wanting to go back.

It was an operation that was carried out, but I understand it is still classified as top secret. How it could do any more than embarrass someone who perhaps made a judgment based upon the best information he had, how Operation Keelhaul could do any more than just embarrass someone I cannot understand. For a document describing Operation Keelhaul and the Keelhaul files to still be classified 25 years after World War II, a quarter of a century ago, is absolutely ridiculous.

Now, I think we need an automatic system of declassifying papers unless those papers come up and someone at the secretarial level reviews them and states that they must be continually reclassified.

I think we need an oversight committee here in Congress that does nothing but review the classification procedures and has the authority under the statute to issue declassification orders.

It seems to me that the power of the executive privilege, a power that has grown since its first timid pronouncement by President Wash-

ington, has gotten to be a tyrannical power, a power that can destroy this Government as sure as an outside force can destroy this Government. And I believe that our system of Government cannot be sustained unless the Members of Congress and unless the general public are advised as to what are the facts in these matters that are essentially historical in nature and have nothing to do with the future plans of operation of this Government.

Now, I have spent a considerable amount of my life being a soldier. I know that it is impossible to communicate your battle plans, even though they may be remote, to your enemy. But where decisions have been made, and where operations have been carried on, and where it is no longer possible or no longer feasible or no longer practical to protect the source of intelligence information, it is just completely ridiculous to carry on the classification of documents such as you and I witnessed.

I doubt that there are very many Members of Congress who have not asked one of the agencies for a report on a situation only to have a document delivered to them classified as confidential or secret or top secret, the very contents of which they might have read in the local newspaper or in one of the magazines or have seen on television.

I know Members of Congress who have told me they refuse to go to some of these briefings because they do not want to be bound by some of the silly restrictions that are placed on the information that is given out at these briefings.

I regret to say that, although I have attended, very conscientiously I believe in my own estimation, the briefings that have been given here by the Defense Department, when there used to be reserve units here on the Hill, and the briefings given on the Wednesday morning by the State Department, that even though I have attended most of those, I would guess 90 percent of them, practically all of them involved with the Vietnam war, I do not feel that I have been told the truth about this matter, and I think the average Member of Congress feels the same way.

So I congratulate you for what you are doing. I encourage you to do more. And I hope that you will vigorously push forward in this area.

Thank you, Mr. Chairman.

(Mr. Gibbons' prepared statement follows:)

PREPARED STATEMENT OF HON. SAM M. GIBBONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman, fellow Members, first, I would like to say that I am delighted to appear before this subcommittee—in open session and with the press and broadcast media invited to attend—to discuss the problem of secrecy in Government. It is appropriate and proper that this hearing be conducted in full accord with the broadcast authorization provided in the Legislative Reorganization Act of last year. I only wish that more of our committees which now function in secret would follow your fine example.

The question before us goes to the very essence of a democratic society. It involves the exercise by the Federal Government of thought control and censorship. An uninformed electorate cannot make a rational decision whether it be in the Congress or in the local ballot box. Congress must not stand idly by while information vital to the national interest is suppressed by resort to secret classifications.

Thanks to the courage of a number of the Nation's distinguished newspapers, the full story of our involvement in Southeast Asia is beginning to leak out. Contrary to administration claims, the national security—in its broadest sense—would be enhanced by full discourse of all the historical facts relevant to the escalation of our involvement in this tragic war.

The confidence of our Nation in its Government has suffered a staggering blow. The American people have been repeatedly misled about the true situation and the American role. Suppression of the Vietnam papers will only exacerbate this condition. Rather, we need to get the facts on the table and to know where we stand so that we can act reasonably to bring an end to the war now.

I think it is significant that the information in dispute is historical documentation. None of the material is less than 3 years old. It is part of a study—conducted at public expense—which was completed in 1968. Thus, it does not in any way endanger our national defense. If anything, it provides the Congress with documentation needed to take a reasoned position on the Indochina war so that we may determine what role, if any, we should continue to play in that part of the world..

Mr. Chairman, I have been troubled about this problem of secrecy in Government for a long time. It is for this reason that I worked so hard last year as chairman of the Democratic Study Group Task Force on Congressional Reform to secure adoption of antisecrecy provisions governing procedures in the House of Representatives and its committees. I would hope that we will continue the present trend toward greater openness and accountability in Congress.

Because I have also been concerned about official Government censorship, I was one of the sponsors of H.J. Res. 1296 in the last Congress. That resolution would have established a Joint Committee on Classified Information, with power to review the classification activities of the executive agencies. This year, I have joined with Congressman Harrington in calling for a Select Committee on Freedom of Information.

I have taken these steps out of frustration. As a Member of Congress, I find I am powerless to act in the best interests of my country because the information on which to make an honest judgment is often classified and beyond any reach. While I am not concerned about the question of which committee of this Congress assumes the responsibility for overseeing the problem of executive classification. I am determined that Congress no longer permit the executive branch to hide its mistakes under a barrel labeled "Top Secret."

I would hope that the controversy over the "Vietnam papers" will result in congressional action to set the parameters of legitimate classification. I would hope that we would no longer permit documents to remain classified for 3 or 5 or 20 or 30 years without question. I was appalled to read in the Washington Post of June 20 that the documents relating to "Operation Keelhaul" during the Second World War are still classified. Surely these can be no national security question involved in materials relating to the return of Soviet citizens to the Soviet Union at the end of World War II. The fact that the documents might now embarrass American officials who may have exercised poor judgment over 20 years ago is insufficient reason for official censorship.

I want to make several specific recommendations to this subcommittee relating to guidelines which could curb the executive passion for secrecy. They are as follows:

1. Congress should enact legislation providing a clear definition of national security matters which can be classified and the circumstances under which such classification should be imposed.

2. Each department or agency should be required to number classified documents chronologically and provide to the Congress annually a list of its classified documents identified by number. The list should contain an indication of the number of documents classified in the preceding year including the level of classification, a listing of the documents declassified, and an indication of how long documents remaining on the classified list have been classified.

3. The departments and agencies should be required to review such classifications annually and the continued classification of any document on the list for 3 or more years should require authorization of the Secretary of the Department of the Agency head.

4. A congressional oversight committee should exercise continuing vigilance in assuring the Congress have access to all documents useful to it in decisionmaking and that the public have access to information the disclosure of which will not jeopardize the national security. That committee should have the power to declassify documents at its discretion.

5. Congress should provide criminal penalties for any disclosure of classified information injurious to the national security, but should not interfere with the historical and constitutional freedom of the press from prior restraint.

In sum, Congress must protect the public interest from the secrecy inimical to the interests of a free society. The executive branch has repeatedly demonstrated that it lacks the wisdom to be entrusted with this responsibility.

Mr. ALEXANDER. Thank you, Congressman Gibbons. Your statement is received with appreciation by the committee. Your reputation as a champion for the first amendment, the rights under the first amendment, is widely known in Washington, and I expect, all over the country. I congratulate you on your fine statement.

I am advised by a member of the staff that "Operation Keelhaul" will be a subject of inquiry on Monday. Mr. Julius Epstein will testify in that regard. It may be of some interest to you.

The Chair will now yield to Congressman Moss for questioning.

Mr. Moss. On the "Operation Keelhaul," we encounter another dimension to this problem of making information available because Dr. Epstein, of the Hoover Institute at Stanford University, instituted a suit under the Information Act. And I think the results illustrate the timidity of the courts, and they share a part of the burden at this moment.

It was clearly intended that the courts could look at the documents themselves and determine whether a classification was properly affixed, whether it was required, and yet the courts in the case of Dr. Epstein did not look behind the classification itself, and I think, therefore, the court was certainly remiss in discharging fully its responsibilities to the American people.

One of the great problems over the years has been determining upon language which would achieve the objective of the Congress of having more information available. I don't think we need it for the Congress itself; I think we have the tools whereby we can force the executive to make information available to us. I have never been willing to be bound by the executive's classification; I have stated on many occasions that I would receive information and take due notice of the classification imposed, but that I regarded it as advisory and not binding.

And I don't see how under this system of coordinate, coequal branches of Government, the Congress in discharging its responsibility, can be bound by a classification which might have been made at fourth or fifth echelon of supervisory authority in an executive department. I think we should respect the advice inherent in the classification and then exercise our own judgment.

Wouldn't you agree with that?

Mr. GIBBONS. Yes, sir, I do.

Mr. Moss, when you started to make your comments, I just thought of something that I witnessed the other day on television. I know General Taylor to be a very loyal, competent, intelligent man. I had the honor of serving with him in World War II. On CBS television the other night in one of his interviews, he started his interview as I remember it, he said, "Well, I am not going to defend the Pentagon for its classification of documents." He said, "I know they are overclassified"—I am paraphrasing what he said.

I think it would be very revealing for you to get hold of the video tape and run it and let all——

Mr. Moss. I watched that also.

Mr. GIBBONS. It was one of the most revealing statements I have ever heard. I know that this is a man who is not given to making casual statements and who is well informed and in whose honesty and integrity I have a great deal of confidence. But it was one of the most

revealing statements about overclassification of documents that I have ever heard, and a great condemnation, by a man who has been intimately involved in this whole process.

Mr. Moss. Of course, he has a very distinguished background of service to this Nation, but clearly he regards himself as part of an elite, competent to govern, and he distrusts the average citizen to participate too fully in that process of Government.

Isn't that rather typical of many who use the classification system today?

Mr. GIBBONS. That's right; I agree with you. It just gets back to this whole thing, you know, I don't say that the people who drafted or put together the Declaration of Independence were infallible. They certainly hit upon a lot of truths that are wonderful and served us well.

Mr. Moss. They appeared to have great trust in the people.

Mr. GIBBONS. Yes, sir, and when they said this Government derived all of its just powers from the consent of the governed, they spoke words that we still haven't fully comprehended, because how can you give your consent to be governed when you are misled and lied to? And the invocation of unnecessary classification and executive privilege is just as un-American as anything I can think of.

Mr. Moss. I think we have now an interesting series of statements, the statement of General Taylor indicating an acceptance of the fact that overclassification and needless classification is rampant in the Pentagon; the appraisal before this committee a number of years ago of members of the Coolidge Commission, studying the classification system in the Pentagon that between 90 and 95 percent of all information classified was either needlessly or overclassified; the appraisal of former Justice, former Ambassador, former Secretary of Labor, Arthur Goldberg, gleaned from his experiences in the Department of Labor and as Ambassador to the U.N., that at least 75 percent of the information was needlessly classified or overclassified; and the expert witness before this subcommittee this morning who said that 99½ percent of the information he was familiar with was needlessly classified.

We have at least a balance here of more than 50 percent and certainly any court in the future should take judicial notice of the record of these hearings that overclassification or abuse of the classification system is rampant and therefore there is a real need, if the courts are to render a judgment, that they look at the material itself to determine whether any reason exists for continuing classification on that particular information.

Wouldn't you think that is the kind of obligation imposed on them?

Mr. GIBBONS. I don't see how, under our system of Government that we have, that the courts can turn their back upon the contents of the document in deciding whether or not they shall impose a censorship. And that is what they are doing. The first amendment rights are not rights that belong to the press. They are not rights that belong to the media. They are not rights that belong to an individual person. They are the rights of the 206 million people that this Government derives its consent from.

It is an individual right, a personal right, and if the court is going to protect that right, it has got to look at the contents of the document when it decides whether or not a first amendment violation has taken place.

Mr. Moss. I have a considerable sense of disquiet over the fact that more than a week has now elapsed since the first injunction was granted against a newspaper, the first injunction in the history of this Nation——

Mr. GIBBONS. In almost 200 years.

Mr. Moss. Almost 200 years. And here the public appetite, certainly, has been whetted, and the need to know more about the content of these documents and the circumstances has not been met and delay continues; we know it will be at least through tomorrow. If the Supreme Court takes the case it could be several weeks where there is a complete stoppage of publication of this information, at least on the part of those papers which have previously published it. This disturbs me because it not only involves prior restraint on publication, but it establishes a doctrine which would permit prior restraint on you, on me, and on any other individual American from speaking.

Or it could permit prior restraint on our churches, or on our right of assembly. These are so fundamental as rights of Americans that even the delay of a week should outrage this Nation. It should not be permitted to continue.

Mr. MCCLOSKEY. Would the gentleman yield?

Mr. Moss. Yes, I would be happy to yield.

Mr. MCCLOSKEY. Isn't it also important, though, that in view of this historic confrontation, where the documents do not affect pending decisions as much as they do past history, that the separation of powers be recognized to permit the court sufficient time to carefully consider the issues?

As I understand it, the sole reason for the delay is so that the judicial branch can very carefully consider these arguments of first moment. Thus far the courts that have considered it have ruled invariably against the Government, and against the right of prior restraint. It does not seem to me that our very historical judicial process, of men dispassionately deciding these great issues only after careful consideration, does of necessity require sufficient time to consider them.

Mr. Moss. The thing I am concerned with is the very accommodating nature of the rulings against the Government. While the courts find the Government has no merit in the case, nevertheless the Post cannot publish until after Friday, and the Times has to go back to court and we don't know how long before it can publish. And there is here the continuing denial of a first amendment right and this, as I stated, concerns me deeply.

I think—if the courts have to go on a 24-hour schedule, so be it. They have no more important business than the determination of this question. And if they are going to accommodate the Government at every turn, even though they find no persuasion in the Government's case, that disturbs me.

Mr. MCCLOSKEY. I concur in that last comment.

Mr. Moss. I thank the gentleman for his testimony.

Mr. ALEXANDER. Mr.Reid.

Mr. REID. Thank you, Mr. Chairman.

Congressman, I certainly want to commend you for your statement.

Mr. GIBBONS. Thank you, Mr. Reid.

Mr. REID. I think it is very helpful and I have known of your interest in these matters over a number of years.

Let me direct your attention to one paragraph on page 2 of your statement in which you said in reference to your House Joint Resolution 1296:

> That resolution would establish a Joint Committee on Classified Information with the power to review the classification activities of the executive agencies.

Would you not agree, Mr. Gibbons, that the power to classify does not reside exclusively with the executive? And, while there may not be an absolute right between the coordinate branches of the legislative and executive, clearly the Congress has a right to make a judgment on whether the classification procedures are correct, has a right in some instances to declassify if it is manifestly misclassified and quite probably has the final and preeminent right to withhold funds from the executive should they improperly classify to the extent that the Congress is impeded or the American people are unable to exercise or to be assured of the right of accountability, either from the standpoint of the first amendment, freedom of the press, or from the standpoint of legislative authority? And that we must retain the ultimate right over classification?

Mr. GIBBONS. As the people's representative, I think that we must assert a right to declassify the actions of the executive branch. I do not think there is any other way that it can be done. As long as the executive branch can in effect write its own rules and protect itself from its own mistakes, there is no way for this triparty system of Government we have to function properly.

It is perhaps the biggest problem that we have in Government today, the fact that you just cannot get the accurate information that you need to make the important decisions because the executive branch can hide them from you.

Mr. REID. Is the gentleman familiar with a little-known statute—I must allow I was not until recently—that was passed in the First Congress of the United States on September 2, 1789, drafted by Alexander Hamilton? It said explicitly and indeed it has been referred to by the courts:

> It shall be the duty of the Secretary of the Treasury to make reports and give information to either branch of the Legislature in person or in writing as he may be required respecting all matters

I repeat—

> Respecting all matters referred to him by the Senate or House of Representatives or which shall appertain to his office.

It was subsequently noted in a—this point was noted in a somewhat different sense, was noted in *McGrain* v. *Dougherty* in 1927 where it was held that the power of inquiry with the power to enforce is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified.

That is to say that in the first session of the Congress, and indeed in the Continental Congress, it was understood explicitly that the power to compel a witness or any documents or any material relevant to the Congress constitutional responsibilities was and should be provided by the executive to the Congress.

It seems to me, and this is my question to the gentlemen, has not that power very sharply eroded? And may it not be necessary for us

to redress that balance, perhaps by legislation in connection with some of the classification matters and perhaps by constitutional amendment if we have to address ourselves to an imbalance of the branches of Government.

Mr. GIBBONS. I think that that is one of the many and perhaps the most important power of Congress that has been eroded, eroded by a powerful executive, and eroded by sometimes the lethargy that builds up in this Congress.

Mr. Moss. Would the gentleman yield?

Mr. REID. I would be happy to yield to the gentleman.

Mr. Moss. There is another statute, the Budget and Accounting Act of 1921 which states that all departments and agencies of the Government shall supply to the Comptroller General of the United States such information as is in his judgment necessary for him to evaluate the effectiveness, the efficiency of our Government. And yet the Comptroller General is routinely denied information which in his judgment is absolutely critical to an evaluation of the operations.

I think we only have to look to the Pentagon cost figures which he cannot get. Here we have a statute enacted in 1921 which clearly sets forth that information from all departments and agencies shall be made available and yet information is routinely refused. The statute is ignored. And in one instance before this committee a Secretary of the Air Force relied upon the "take care" clause of the Constitution as the basis for refusing to make information available to the Comptroller General of the United States.

You may recall that is the clause that says the President shall take care that the laws be fully executed.

I thank the gentleman.

Mr. REID. Would not the gentleman from California agree that it is going to be essential for the Congress to retain and to insist on and, if necessary legislate toward the maintenance of the ultimate power over classification?

Mr. Moss. I do indeed. And we may have to resort to conditioning appropriations in order to exercise our full power to deal with this problem.

Mr. REID. And should we find that the Executive is not willing to account properly to the American people or the Congress and that there has been dereliction, we may then have to acquire the information and declassify it so that the American people can be apprised of what their Government is doing.

Mr. Moss. I think that is quite correct. This committee has on occasion in the past declassified during hearings.

Mr. REID. One other question of the gentleman from California who I know is a student of the question of prior restraint.

In the case of *Near* v. *Minnesota*, and in the light of the colloquy that just took place, we have now seen a delay of a week. And perhaps there will be additional days of delay, which means that a basic right of the American people, the right of newspapers to publish, has been denied for a period of a week or more. Are we not going to have to do something to insure that this kind of procedure will not be possible in the future if, as some of us believe, the advocacy of the right to prior restraint is such a serious question, carries such adverse weight on the future of our Republic and to the freedom of the press, that if it was

ever used even in a relatively specific but general way, it could lead to such an erosion that the freedom of the press would be imperiled? And must not we be sure at the conclusion of this matter that any further consideration by the courts in the future of a question of prior restraint must have very, very heavy evidence to support it, which does not seem to be the case today?

Mr. Moss. I agree with you. I think there are few problems before the Congress at this moment of greater urgence.

Mr. Reid. I thank the gentleman from Florida for his helpful testimony.

Mr. Alexander. Mr. McCloskey?

Mr. McCloskey. I would like to commend the gentleman from Florida on the five specific points that the gentleman has recommended. It seems to me that they cover those areas very clearly that we should be considering in the matter of appropriate legislation.

I am interested in the fifth point, that Congress should provide criminal penalties for any disclosure of classified information injurious to the national security.

An earlier witness indicated this morning that so far as he knew there was no criminal penalty for disclosing classified information unless under the provisions of the Espionage Act. This act requires a specific intent to injure the Nation or to assist a foreign nation; or, under a second provision of the Espionage Act criminal sanctions are imposed for transmitting of cryptographic information or photographs of the yards and docks.

Apparently there is no criminal penalty now for merely copying a classified document and releasing it if it is not done with specific intent to injure the Nation. Can you comment on that? Do you have any recollection as to any additional criminal statute that might apply other than title 18, sections 793 to 798?

Mr. Gibbons. Mr. McCloskey, I looked over that matter before I came over here and brought the statute book with me thinking I would have an opportunity to go into it a little deeper and then got interrupted by one of those many quorum calls.

There is nothing in this section of the statute that calls attention to any more. I think the law is as you outlined it there. It requires a specific intent to deliver information to the enemy that would injure this country, and I think 793, although it is pretty long and takes a Philadelphia lawyer, practically, to read it, is a statute that certainly needs redrafting.

Mr. McCloskey. I think that the whole testimony thus far has brought out the need for additional legislation. If it is not a crime to violate an Executive order per se then, of course, the whole top secret, secret, and confidential security classification means nothing with respect to the right of an individual to violate it. He may be subject to administrative penalties by his department head or his Secretary, but not——

Mr. Gibbons. Or lose his veteran's benefits or something like that.

Mr. McCloskey. We have been under the illusion for some years that it might be an offense to distribute this matter. But if you make the violation of the Executive order a crime, it then appears that department heads are likewise guilty, on a wholesale basis. The Executive order requires heads of departments or agencies originating classi-

fied material to designate persons to be responsible for continuing review of such classified material for the purpose of declassifying or downgrading it whenever national defense considerations permit.

Now, quite clearly that has not been done. At least the testimony before us earlier today indicated that no one in the Defense Department really paid much attention to declassification or downgrading it.

Mr. GIBBONS. I think there has been little effort to get rid of the classified material.

Mr. MCCLOSKEY. I think all of us have read the New York Times and Washington Post disclosures. Now we have the Los Angeles Times, Baltimore Sun, and I think the Chicago Sun Times and the Boston Globe involved in publishing the materials. We are faced with the question whether we in the Congress should declassify these matters and make them available to the public, regardless of the executive branch classification.

I have been intrigued by the fact that if the Executive order language is followed literally, this document, constituting 47 volumes before us, is classified top secret. Yet, if it is properly classified top secret, the Executive order itself says that the top secret classification shall be applied only to that information or material when the defense aspect is paramount and unauthorized disclosure could result in exceptionally grave damage to the Nation. This damage would be anything leading to a definite breakdown in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies; a war, or the compromise of military or defense plans or intelligence operations; scientific or technological developments vital to the national defense.

I will confess that in the few pages I have read which apparently are part of this top secret study, I find nothing even remotely related to any of those exceptionally grave possibilities of damage to the United States with the possible exception of the names of the CIA agents who participated in the overthrow of the Diem regime.

I conclude we should not disclose the names of the CIA agents because that would compromise intelligence operations, but apart from that, have you seen anything in any of the documents published thus far that would constitute or possibly result in exceptionally grave danger to the Nation as defined in this Executive order?

Mr. GIBBONS. No, I frankly think the damage is far graver if they are not disclosed. I think the people's confidence in their Government is going to be more severely damaged by failure to get the truth than it will be by the covering up of what the truth is.

I would imagine that those CIA agents have long since retired, and it may be embarrassing to their families, or personally embarrassing to them for having participated in something that was carried out as that was, but I would be willing to maintain an open mind about disclosing the man's name.

Perhaps that is not necessary. But if we actually participated in that operation I think the public ought to know it.

Mr. MCCLOSKEY. One final question——

Mr. GIBBONS. Even General Taylor said he thought it was one of the worst albatrosses he had to carry in his role, to try to be America's representative in Vietnam.

Mr. McCloskey. One final question. Viewing the historic precedent that such a determination by the House of Representatives would be, can you give any advice to this subcommittee as to whether or not we might not have an obligation to lay this question of the 47-volume work before our full Committee on Government Operations and subsequently the full House of Representatives at the earliest possible date so that the House as a whole might enunciate in ringing terms that this classification is erroneous and the American people should be informed at the earliest possible date of all of the contents of this 47-volume work, save and except those that the House in its wisdom determines to be secret?

I find precedent for this determination under article 1, section 5 of the Constitution, which states that we shall keep the records of our proceedings and that those records shall be published from time to time, save and except for those matters which we determine to be secret or to require secrecy.

If that is so, it seems to me perhaps this subcommittee owes the people of this country the earliest possible determination of this issue and the revealing of these documents if we are otherwise precluded by the delay caused by the court determination under the first amendment.

Mr. Gibbons. I notice that the President—and I have to get this from the press reports—has apparently ordered these documents delivered to the Speaker, and I understand the Speaker has in turn turned them over to the chairman of the Armed Services Committee. I want a little more time to think through that procedure before I either praise or criticize it.

I know it is impossible for all 435 of us to sit down and read the two and a half million words that are allegedly in these documents. And yet I think there is an obligation on the part of all of us to do that because certainly nothing could impinge upon the duties of our office any more than to see what many of us who were here at that time thought we were participating in and what we actually participated in.

As I say, I can remember conversations in this Capitol area with administration officials that practically dispute some of the things that are alleged in these documents.

I can remember, although I took no notes on them—I wish I had taken notes now—conversations with many members of the administration, and even conversations that many members had at the White House with the President about the nature of our involvement and the reasons and the causes and so forth.

As I said before, Mr. McCloskey, I feel like that I have been misled. Now, maybe it is just my conscience that bothers me, but—or maybe it is a bad memory that bothers me, but between that, allowing for all that, apparently the rest of the American public feels the same way too. And I think that the main thing we have to do is to bring the truth out, as torturous as it may be, as embarrassing as it may be so that hopefully we will not make that kind of mistake again.

As I said in the beginning, I had long been discouraged of the fact that anything constructive would come from the sacrifices in Vietnam. But perhaps if we learn from this terrible experience that the American people must be taken into confidence with their leaders, that decisions must be based upon full knowledge of how it was brought about, then perhaps our sacrifice will not have been in vain. That, to me, could

be a great thing that leaders all over the world could learn and that perhaps history will record that that is the greatest thing that came out of this.

But you cannot deceive the 206 million people that you lead and expect to succeed. You cannot deceive and succeed. And that is what has happened, apparently, in this country.

Mr. McCloskey. What the gentleman is saying is that we go back to the basic premise on which we formed the U.S. Government, that consent of the governed requires that the governed be fully informed, particularly in matters of war and peace.

Mr. Gibbons. All of the just powers and I emphasize the words just powers, are derived from the consent of the governed.

Mr. McCloskey. I thank the gentleman.

Mr. Alexander. Mr. Moss?

Mr. Moss. I would like to ask, in context with the discussion that just took place between you and Mr. McCloskey, if you feel as I do that we must now have full disclosure of all of these papers as a first step in rebuilding the confidence of the American people in the credibility of their Government?

Mr. Gibbons. Yes, sir.

Mr. Moss. That there probably is a greater danger to the security of the Nation through the loss of confidence of the people in their government than could possibly be directed at us or against us from outside?

Mr. Gibbons. I believe that, sir. I am not one of those who believes that we do not have enemies outside of this country. As I said in the beginning, much of my background was that of a soldier and, as all Americans, I love my country and I do not want to ever lose a war, and I do not want to ever lose a war by having given away vital secrets. But I also do not want to give away the concept of this Government by default, by letting it go as it has gone.

I think some of the troubles that we have seen, Mr. Moss, in our more recent time, have come from a lack of confidence in the Government because the people, while they did not say their Government was lying to them, they did not think they were getting the full truth either. That has caused trouble, deep trouble.

I think perhaps it has taken 200 years to get where we are today, to really see clearly what our forefathers put in the Declaration of Independence. But we are there and it is manifest in the reactions of people.

I think it is manifest in the fact that not many people, fewer and fewer people, turn out for elections because, you know, you have heard them say, and I have heard them say "I don't trust any of them."

Mr. Moss. There is an air of futility.

Mr. Gibbons. That is right. I think we can lose our freedom that way as well as by military actions from the outside.

Mr. Moss. I agree with you on that. Thank you.

Mr. Alexander. Thank you, Sam. We appreciate your sobering remarks.

The Chair recognizes Congressman Robert Eckhardt who will appear and make a presentation at this time.

I would like to make an announcement for the benefit of the press. Chairman Moorhead has met with the Speaker of the House and he

is presently meeting with the Parliamentarian. He will be back to the committee room in the next few minutes and we will have an announcement to make that will be of interest to you.

Mr. Eckhardt?

STATEMENT OF HON. BOB ECKHARDT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. ECKHARDT. Mr. Chairman and members of the committee, I first wish to apologize for not having a written statement for you. If I may say so, the situation is this: The cat is out of the bag, the U.S. attorneys are chasing the cats, and I have been chasing the U.S. attorneys.

They have attempted to catch the cat in New York and Washington and now in Boston, and for 27 of my colleagues I have been engaged at least in part of the legal activities in filing interventions in each of those cases, the last of which was just completed about an hour ago and sent to Boston.

So that is the reason I don't have a statement. But I thought that perhaps this committee would find it helpful to have a bit of discussion with respect to the relationship between three cases, the decisions that have been handed down and the questions that have come up in these cases relating to classification. It seems to me that there are really three questions involved.

The first is the question of first amendment rights per se. That is the application of the case of *Near* v. *Minnesota*, the question of previous restraints. The second it seems to me is the question of what can the Government do to keep the cat in the bag, so to speak.

That has to do, of course, with regulations respecting classification, penalties which might be applied to classification regulation violations et cetera. And the third question which relates to the other two is the question of access of Congress to documents that affect its processes.

It is because the first question, that is the question of previous restraints raised in the New York Times case and the Washington Post case and now in the Boston Globe case, has a direct effect on the access of Congress to the information on which it may act that it seemed appropriate for 27 Congressmen to intervene in these cases.

Now, I wish to hasten to say that the 27 Congressmen are in no sense attempting by their intervention to get the courts to do anything that Congress should do. The Members are not in conflict with the judicial power. But the interest of all Congressmen as individuals and as representatives is the other side of the coin on the question of free speech from that of the newspapers.

The newspapers have the right to publish without previous restraint except in the very narrowest judicially determined category, and that is the category of *Near* v. *Minnesota*. This has absolutely nothing to do with classification. There is no way that the administrative authority may write its own exceptions to the almost absolute prohibition against prior restraint of speech or of the press.

The other side of the coin, of course, is the interest of Congress to be the recipient of an expression which may not be impaired by previous restraint, and that is exactly the position we took in these cases. We have a different interest than the newspapers and in no sense could we

be in any way restricted by anything or any limitation which may be imposed on the newspapers by virtue of the means by which the information was got.

It seemed to me that our intervention at least threw the question in a little more brilliant light and that is the reason for the intervention.

Now, so much then for the intervention and its basis. Now, let me describe to you a few of the experiences that we are encountering with respect to the court processes, because I think it raises some questions as to policies which this committee and which Congress may desire to address itself to.

I have, I think, been in on all of the proceedings that were not in camera, with perhaps a slight exception in the New York case. This has been extremely enlightening. The whole question of in camera hearings is an extremely interesting question. And it raises a question of court process that I think needs to be considered.

In the New York case before Judge Gurfein, the witness for the United States who testified concerning the method of classification testified that one of the most sensitive areas of documentation, therefore calling for the highest level of classification, had to do with dealings with another government, dealings with another government which on some occasions was given in confidence to this Government.

Of course, this could also include—I don't use the term pejoratively—a client government like the government in Saigon. Judge Gurfein asked the witness:

> In such instances about where are you in the process of declassification?

The witness said:

> We are up to about 1946.

Judge Gurfein then said:

> Do I calculate rightly then that there may be a span of 25 years between the time the instrument is self-marked by the executive department and the time it is declassified?

And the witness said that that was correct.

Of course, on that basis and assuming these instruments may be kept away from Congress, we should have the full story of the Tonkin Bay incident in 1990.

Now, I think that illustrates part of the problem that we are confronted with. Now, another problem that arose in connection with these hearings was with respect to our intervention, or our attempted intervention in the *Washington Post* case. We served the parties with our brief of intervention and with the papers on the night before the hearing, and we also supplied the court with the papers so that Judge Essel would have an opportunity to examine the papers before we appeared in the morning urging participation in the suit.

Judge Essel read the papers and I am sure he did because he commented most intelligently on their contents, and, of course, he is a judge with that kind of reputation.

At the commencement of the case, Judge Essel ruled on our application and this is what he said. He said:

> Twenty-seven Members of Congress have sought to intervene. It will be necessary in this procedure at some time to hold in camera hearings.

He said:

> The reason I am not permitting intervention but am permitting them to come in in the status of amicus curiae, with special privileges to argue, is because I don't know how I can permit them to be parties and exclude them from the in camera proceedings.

Incidentally, Mr. Moss, I think this bears out exactly what you have said the law is on the point. Judge Essel said:

> I do not believe that I could exclude them as parties from the in camera proceedings, but I would have to enjoin any person in the in camera proceedings from revealing any of the information. I do not believe that I have the power to do that with respect to a Member of Congress, and even if I did, I would not be inclined to use that power.

Mr. MOORHEAD (presiding). There is a recorded teller vote, so the subcommittee stands in recess for 15 minutes.

(Recess.)

Mr. MOORHEAD. The subcommittee will come to order, and will continue to hear from the distinguished colleague from Texas, Mr. Eckhardt.

Mr. ECKHARDT. Now, Mr. Chairman, let me avert just a moment to another piece of testimony that came out both in the New York trial and in the Washington trial. The witness for the United States testified that a study of this nature, consisting of the 47 documents, always takes on the classification of its most sensitive part or its most sensitive source. Therefore, the 47 documents per se, as a set of documents, were classified top secret. And of course, the petition of the United States was to enjoin any publication from the document, which of course would logically include even two volumes that were public papers of the President.

Now, let me show you how that relates to the in camera proceedings. That means, since the Government has not specified in advance and in its pleadings just what portion of those documents are purported to constitute an exception to *Near* v. *Minnesota*, that virtually the entire consideration of the case is in camera.

Now, let me show you how that is injurious in two ways: No. 1, of course the obvious proposition that all court proceedings should, unless the most extreme circumstances exist, as Judge Gurfein said, be public, but this prevents nearly all of the procedure from being public and permits the judge to consider extremely sensitive questions of public concern as between a wide range of documents, some of which are purported to be very top secret and some merely confidential, to be considered out of the view of the public, and if you please, even out of the view of the group of Congressmen that were seeking to intervene.

Now, I think under the Federal rule we in fact had a right to intervene in that case, and we in fact had a right to hear the matter upon which the case was decided. Yet, as a practical matter, I do not disagree with Judge Essel's judgment to limit our status. I think, practically speaking, if you approach this area which is considered to be an exception to the *Near* case, and if you can conceive of the right to have an in camera proceeding on that point. Judge Essel was correct; the court could not bind a Congressman even though the Congressman was in an in camera hearing. So he couldn't let us in and

yet protect the secrecy of the papers until he had determined the fact and law issues involved.

This creates a very difficult, anomalous situation.

Mr. REID. If the gentleman could yield for a question on that point?

Mr. ECKHARDT. Yes.

Mr. REID. I would guess from what the gentleman says that that is an application of the classification procedures, consistent with the Executive order. And as the gentleman knows, in the Freedom of Information Act there is compulsion to reveal that is required of the Government, not a compulsion to protect. And classifications can only be applied to that portion of a document that is relevant.

When you get to top secret, it has to be extremely grave and serious to the United States. I would not think it was a proper classification. And if the administration maintained that, I think they are in error. They could classify a certain portion of those 47 volumes if it met the classification standards, some of which I think can be determined not by the executive, but by the Congress.

Does the gentleman have an opinion on that?

Mr. ECKHARDT. Well, I think, Mr. Reid, you are absolutely correct with respect to what the Government ought to have done. But if the Government does classify the whole body of instruments as top secret, and then the court is called upon to make a determination as to whether or not any portion of those documents constitute matters within the exceptions in *Near* v. *Minnesota*, then the court is bound to consider these matters and find out what is top secret. The result is of course that virtually the whole proceeding is in camera.

I think you are right as to what the Government should do, and that is exactly the point I am making here. If the Government acts wrongfully, the Government very seriously impedes the judicial process and very, very seriously threatens the right of free speech.

Mr. REID. And a free press.

Mr. ECKHARDT. And a free press, of course.

Now, Judge Essel in considering this case and these facts remarked that the Government had asked an injunction covering all of the papers because of such classification, and he remarked that the Government had a duty to point out within the papers what constituted that extremely sensitive type of information that the *Near* case envisages.

You know what it says: It gives examples of a ship sailing from a certain point with troops to another destination with the revealing of the course of the ship, or a question of strategic movements of armies, and so forth.

Now, of course, I don't know what went on in the in camera proceedings, but I do know that both Judge Gurfein and Judge Essel and ultimately the Court of Appeals for the District of Columbia, decided that nothing that came out in those hearings constituted an exception to the *Near* v. *Minnesota* case. Now as to the Court of Appeals for the Second Circuit: It is not quite clear what they held. What they did the last I heard—of course these things are developing by the moment—was to remand the case to Judge Gurfein to accept certain other documents that had been brought in at the appeal level, but had not been brought in at the trial level, and consider whether or not these fulfilled the standard set out in *Near* v. *Minnesota*.

Of course, as I understand it, the New York Times is appealing that decision. But I think that this very well illustrates the harm of the kind of loose classification system that you are complaining about here. There should be a duty on the part of the United States to classify with a high degree of nicety with respect to instruments, particularly which they believe constitute the exception under the rules in *Near* v. *Minnesota*. If they do not do that, then you are confronted with exactly what Mr. Moss objects to, that is, the bringing of a suit on a broad assumption that there may be a danger to the public right and a period of prior restraint, temporary in nature, until the case can be tried.

Now, I agree with him that this is a very, very unsatisfactory situation and procedure; yet I cannot help but agree with Mr. McCloskey that the courts were almost compelled to follow it in order to prevent the case from becoming moot. At any point where the newspapers could have published while the court was considering the case, of course, rapidly the case would have become moot. And I think we must all recognize that the courts have moved remarkably fast. We will probably have gone from the trial level to the Supreme Court level in three important cases with a mass of documentation within the period of 2 weeks.

I think that is something to say for our institutions.

Mr. Reid. Might I ask that that point—you raised the question of whether or not the courts were correct in taking the action they did, because if they didn't, the point might become moot.

I would ask you whether the question of prior restraint is not so serious, so detrimental on its face, so explicitly dangerous in its consequences to a free press, that the weight of the court intervening to prevent the right to publish, which is the effect of this, is so serious that merely whether a question possibly is going to become moot or whether it is a question that should be before the courts or not is not sufficiently serious to overturn the free press, and violate seriously first amendment rights?

I am not sure I would agree with you that the courts have to act solely because it might become moot. We are overturning one of our most cherished and fundamental freedoms, which if it is ever really once overturned, may never return.

Mr. Eckhardt. I think in answer to that question I would say that Judge Essel acted exactly correctly in the case. What he did is consider on the application for temporary restraint order enough of the case to determine that the *Near* v. *Minnesota* question had not been raised other than in the pleadings, or that the pleadings were too broad to reasonably be construed to embrace it. And, of course, as you know, he refused the restraining order, and I think he properly acted.

But, of course, it would have been conceivable that he could have received information that indicated to him that the *Near* v. *Minnesota* exception might exist, in which case I presume that in order to protect the possibility of that doctrine applying, he could have issued a temporary restraining order.

I don't think he properly should. I think he should have immediately set down a hearing for preliminary injunction and perhaps issued a temporary restraining order only during the period while the matter was in trial. But if you do recognize any exceptions to

the prohibition of previous restraint—incidentally, I know of no court that ever has in a situation like this. The *Near* case is merely dictum. As you know, the *Near* case was a case where Minnesota had a statute providing that the publication of a newspaper which characteristically defamed people constituted a nuisance and therefore it was sought to enjoin the newspaper.

There was no question, of course, of danger to the national security. All of those cases involving the clear and present danger doctrine are not cases in which the fallout of the information may endanger security, but rather pertain to the impact of the statement itself. The analogy of Justice Holmes of crying fire in a crowded theater, which results in action without intervening contemplations is what is meant by that.

So the *Near* case doctrine is not precisely a case of clear and present danger. The *Near* case doctrine is the case in which there may be a collateral result of the speech, not its intended result, which creates a danger to security. And I know of no case which actually has applied the *Near* case doctrine. So you may be right, Mr. Reid; it may be that the *Near* case doctrine should not be applied in any case, that there should be an absolute protection of free speech as against prior restraint.

But I think that is a philosophic and legal argument that really has not yet been met by the court.

Mr. Reid. If we are to assume that is correct, the only possible exception—again I would think this could only be looked at in extremis, a very grave matter indeed, there would have to be a very clear and present and major danger, and I know of nothing in any of the documents that remotely resembles clear and present danger. Do you?

Mr. Eckhardt. I think that is absolutely clear. That is what Judge Gurfein and Judge Essel found, and the Court of Appeals for the District of Columbia.

Now, the question then arises how can we prevent the introduction of a pleading which raises the possibility of *Near* v. *Minnesota* exceptions applying and results in this kind of delay to free speech in the sensitive period of time like that which existed while the New York court had this matter under injunction?

You will recall, of course, that we were considering in the Senate at that time the draft bill with both the Chiles amendment and the McGovern-Hatfield amendment, and in the House we had the Nedzi-Whalen amendment with respect to the military procurement bill.

Now, you will also recall that these considerations were on the very day that the fourth of those installments would have been printed, but for the restraint. And, in the case of the Chiles amendment, if five votes had been changed, it would have changed the result.

Now, we can't say that the failure to print that article resulted in the Chiles amendment failing, but we also can't say that if the articles had been printed, the Chiles amendment would not have passed. We can say with absolute positiveness that the issues involved in that article were relevant to those points. And Congress was entitled to have them at the time.

Now, what should be done? It seems to me in any case in which the injunction sought is based on pleadings that are wider than the *Near* v. *Minnesota* exception, the court should, or perhaps Congress should de-

vise a means by which the court can immediately dismiss the case. It seems to me that there is an absolute burden on the part of the United States to come in with sufficient specificity to attack that point which applies to the *Near* v. *Minnesota* exception.

Mr. REID. And, further on that particular point, shouldn't it almost be inadmissible on the face of it that the Government cannot come in and request prior restraint when it does not even know the documents to which it is referring?

Mr. ECKHARDT. Well, I think that is correct. Of course the whole fault of the thing was the theory of the Government on this matter. It was even reflected in the argument before the court of appeals.

The very distinguished Solicitor General, former Dean of the Harvard Law School, Mr. Griswold, appeared and argued a rather proprietary doctrine with respect to these instruments. He used the analogy of Ernest Hemingway leaving his papers or his manuscript in a book in a cafe and having them stolen. He asked could he not then enjoin the publication of those papers as a work of someone else.

I pointed out that if that were the case there would hardly be the question of free speech involved. I cannot conceive of the Congress even being concerned during the period of the Spanish Civil War with the manuscript of For Whom the Bell Tolls. The thing about it is this is a literary property and not a matter which contains the very essence of what Congress and the public need to make important decisions on.

The other example given was a law clerk who purloins a preliminary advisory draft of an opinion of a court. Can that information be revealed without injunction?

Again, who cares in Congress about the preliminary report? This is not a question. This is not the material which is concerned with the matter of free speech. In that sense this is a property and it is not an opinion, it is not a convincing piece of fact that will change the minds of people with respect to public issues.

The third example was the revealing of certain information by a fudiciary, which would injure his principle. Of course, again, the question is a proprietary interest and has nothing to do with free speech.

So the flaw of the argument of the Government in this case was that by labeling a document top secret it thereby becomes top secret and satisfies the standard of the *Near* case.

The distinction is simply this: As long as one is concerned with the husbandry of documents (that is, documents in the hands of Government) it is proper to designate them and to make certain provisions with respect to employees of the Government releasing them. But when the documents are in the hands of a willing purveyor of the news, at that point the decision is not a matter of executive classification but is a judicial classification which may be made solely under the theory of *Near* v. *Minnesota* if it may be made at all.

Now, that is the point, it seems to me.

How does this affect this committee's action. Frankly, I am a little bit concerned about the proposition that has been discussed before this committee of providing for specific punishment for certain classifications without regard to whether or not there is proof of an actual crime with a showing of criminal intent.

There are several problems concerning it. In the first place there is no way that you can absolutely guarantee that those zealous husbandmen that hold the papers of the United States will not extend their classifications beyond what is necessary or reasonable.

Another thing that is a terrific problem—and it is illustrated by this case. How are you going to conduct a review over the classification of documents that you do not know exist? These are the problems, it seems to me.

So I am not altogether sure that some kind of common law approach of the type which now exists, based on the question of whether or not there is culpability with respect to the release of really dangerous documents—I am not sure that that is not the best method of approach in this case.

I would submit to the committee that a common law approach has been an awfully good approach in many of these matters that involve extremely complex and interlocking interests.

You have the question of free speech under the *Near* Case and then you have the question of post-distribution punishment which can also be a chilling influence on free speech.

For instance, you know there is a distinction, of course, in ordinary lible cases between previous restraint which is not permitted, and responsibility after the printing, which is permitted to be established. But in the case of public officers, where the matter is of such importance that the public should receive an opinion, whether that opinion is precise, correct, or incorrect, the courts have held that even the discouragements of free speech, holding one liable after the act, is not permissible because it restrains free speech.

Now, isn't that principle possibly involved in a case of this nature? I think it definitely is if the executive department may arbitrarily—or perhaps I should not say arbitrarily, perhaps with some reason, but with reason that would be overturned after a hearing in a court as respects the incipient danger of the article being released—if the executive department may apply that kind of restriction.

I submit that that is a matter that deserves your attention. If you ever decide to say that with whatever safegnards a document is labeled top secret or confidential, that anyone taking that document will be responsible for a criminal penalty, then this question is drawn sharply in focus.

Now, of course, all of us will immediately agree that if the act constitutes treasonous action, espionage, or otherwise violates criminal law, it should result in punishment, but had we not better use a criminal standard with intent as an element and with an opportunity for the court to review the circumstances in which documents were taken and whether or not those documents were solely related or primarily related to matters of opinion that are strongly related to the interest of the public to know?

Had we not better follow some policy like that than attempt to draw an inflexible yardstick in advance?

I thank the committee for hearing me on this point.

Mr. Moorhead. Mr. Moss.

Mr. Moss. Well, as always, I find that I benefit from hearing you and I want to compliment you on the work you are doing in this case.

I think it is well that Congress be represented in the cases now being considered by the courts.

I would like to go to the question of the classification system and its use or abuse—it seems to be about equally abused as it is used in the course of our Government.

If we are going to permit prior restraint to be imposed under any conditions should not it be under conditions spelled out by the Congress?

Mr. ECKHARDT. Well, I really do not think Congress can spell them out. I think with respect to prior restraint the point is completely governed by the first amendment and presently the leading case on that point, the only case I know of that spells out the standard or the possible standard of any kind of restraint, is *Near* v. *Minnesota.*

Mr. Moss. And that is very, very sketchy, isn't it?

Mr. ECKHARDT. Well, of course, according to the Court of Appeals of the District of Columbia it is extremely difficult to meet that standard because what that standard really means is that the immediate result of releasing this document will cause dire harm to the United States, immediately and almost mechanically, not as a matter of hurting our prestige abroad, or reflecting on our diplomatic position, or hurting the reputation of persons in executive authority, but in the sense of immediately resulting in that kind of injury that affects the United States itself.

Mr. Moss. Well, you are using the definition of "top secret" as contained in Executive Order 10501.

Mr. ECKHARDT. Perhaps even stricter. I think there are some things covered under top secret——

Mr. Moss. That is substantially what the requirement is that is imposed by the Executive order as a condition precedent to classification at the top secret level.

Mr. ECKHARDT. I will say this, that the *Near* case requires at least that strict a standard, and it means that that classification must be in fact accurate and must be in fact the circumstance which would exist at the time.

Mr. Moss. Who do you think should impose the guidelines for classifying, the executive or the Congress?

Mr. ECKHARDT. Well, of course, Congress always has the right to do it. But let me say this: I think classification should be for the purposes of determining whether an executive officer should respect a confidence and I think in that respect there is nothing wrong with Congress setting out guidelines and directing the executive department to follow them.

But what I am arguing against, and I really do not even have to argue against it because it is what the Constitution commands, is that nothing other than the immediate danger to the Nation's present physical security constitutes an exception to the proposition that prior restraint will not be enjoined under any circumstances.

Mr. Moss. Where does the Constitution even make that concession to prior restraint?

Mr. ECKHARDT. Well, I do not—it does not literally. But, of course——

Mr. Moss. It does not really, nor is there anything in the constitutional history, nor in the Federalist papers, nor in Madison's notes.

Mr. ECKHARDT. As a matter of fact, quite to the contrary. There is an excellent statement that is referred to in the *Near* case by James Madison that I think spells it out very well. It says: "In every State probably in the Union the press has exerted a freedom in canvassing the merits and measures of public men of every description"—and note this—"which has not been confined to the strict limits of the common law."

Now, the way I read that is that even expressions by the press which go beyond the limitation of the common law are nevertheless protected from previous restraint.

Mr. Moss. Apparently we are going to have to suspend.

Mr. MOORHEAD. The subcommittee will stand in recess and we will resume with you, Mr. Eckhardt, if you are willing to come back.

(Recess.)

Mr. MOORHEAD. The subcommittee will come to order.

Mr. Moss was carrying on interrogation of the witness.

Mr. Moss. I asked if the Congress should not spell out the guidelines, and I did so for the reason that the Congress in title 18 of the United States Code imposed criminal penalties for violation of classification, but it did not prescribe any classifications nor did it spell out any effective guidelines. The guidelines which the program operates today were imposed by the President through the Executive Order 10501 with the various amendments.

The amendment that concerned the committee a number of years ago was in May of 1959, I believe, when President Eisenhower decided that the committee was right and that all agencies and departments of Government should not have the right to classify. So he limited by an amendment to the Executive order the right to classify.

Then, after prodding by the committee again in 1961 or 1962, President Kennedy issued an amendment or issued a new Executive order setting forth declassification procedures. These were not really procedures, because there is little right to appeal or to have any kind of a meaningful hearing. But nevertheless, theoretically a classification can be challenged and there must be automatic downgrading, although again I think I observed far more in the breach than in the performance.

But under the conditions imposed by the Congress in title 18, don't you think we have a responsibility to come up with some sort of guidelines? Can we depend solely upon the Executive to define classifications and the standards for classifying?

Mr. ECKHARDT. Well, from my experience it certainly is true that the executive has done a rather poor job of it, probably a poorer job in application than in definition.

There is only one thing that troubles me about that, Mr. Moss, and I really do not know exactly where I come out on this. It seems to me that if you establish an extremely precise administrative process to set down what constitutes a particular classification and then because that process has been followed you attach criminal penalties for violation, you may be devising a rather mechanical way to determine the violation of a law.

On the other hand, if the standards are standards that a court applies with respect to the nature of the document at the time that it is revealed, and you include the requirement of showing intent, to reveal a sensitive document, you may have a little better law——

Mr. Moss. I want to make it very clear that I would not prescribe any additional criminal penalties. I would, however, tamper with the language in 793 and the subsequent sections of title 18 dealing with this. I would preserve the requirement that intent be proven. That I would not disturb. I would only suggest that the Congress has the responsibility to create a classification system to take the place of the one created through Executive Order 10501.

Mr. ECKHARDT. Well, I think with your qualifications and assuming careful attention to the fact that you are not creating any arbitrary presumptions of guilt, I think that is a good suggestion.

Mr. Moss. Oh, I think you would have to fashion such a statute with exquisite care to insure that you did not establish any presumptions. As a matter of fact, I think if Congress undertook this assignment it would probably have a much narrower area of information subject to classification. The executive's guidelines in confidential and in secret classifications are so general as to be virtually meaningless. For example, there is no provision for punishment of those who overclassify routinely, as many of them do. I think the whole fabric of classification then becomes faulty.

Mr. ECKHARDT. I suppose I should not have said presumption of guilt, I should have said presumption of accuracy with respect to classification.

Mr. Moss. I would have no presumption of accuracy, not on the basis of our experience. I still think that the courts in considering a case have the responsibility to determine whether in fact the classification was properly applied. That is why I was critical of the courts in the case of Dr. Epstein of the Hoover Institute, of their failure in the Operation Keelhaul case to go back and look at the material and determine whether the classification was in fact required in the interests of the Government rather than just accept the classification on its face as being valid.

I think that is true in any case the courts have. I had hoped under the Information Act that the courts would have exercised this discretion more often than they have. Regrettably they have not.

I think that is all I have. I do want to express my appreciation at your being here.

Mr. ECKHARDT. I must say the gentleman from California is so much more familiar with this question of the classification standards than I am that I am even reluctant to comment. But what has been said certainly rings true.

Mr. Moss. I could be facetious on this and say after many years of looking at it, that I think if you want to really confuse any potential enemy, all you do is remove all classifications, and leave it to his own resources and not bother to earmark the areas of potential significance. I realize that would not be realistic.

Mr. MOORHEAD. Mr. Alexander.

Mr. ALEXANDER. No questions, Mr. Chairman.

Mr. MOORHEAD. Mr. Eckhardt, I would like to ask you for your comments on the procedure with respect to making available the 47 volumes of the Pentagon papers to the House of Representatives. As I understand it, on Monday at noon, when the House convenes, these documents will be delivered to the House. The Speaker intends to refer them to the House Armed Services Committee.

They will be available only to Members of the House of Representatives except for the custodial treatment by the staff of the House Armed Services Committee. They will not be available to the staff of the Foreign Affairs Committee or to the staff of this subcommittee or its parent full committee. There will be no opportunity to take notes or make copies and the like.

I wonder if you have any comments to make on that procedure?

Mr. ECKHARDT. I surely do, Mr. Chairman.

Without reflecting on the sincerity of the intent—and I think the movement is at least a gesture in the right direction—I would like to say that it may actually put us in a more difficult position than had the act not be done. I would almost prefer not to look at the documents.

I believe I would prefer not to look at the documents, because much of what is in the documents can be obtained from the newspapers. I can make up my mind from that information and I can also tell my constituents the basis on which I made up my mind without running the risk of at least the appearance of breaking a confidence.

There is even a stronger reason though why this is a bad procedure. If I may know the facts because the documents are available to me, but my constituents do not know the facts, and I must make a conscientious judgment on what I know. How can I either explain or be supported by constituents that don't have the same basis of information?

It seems to me that this does not satisfy the needs of a legislative body. Then there is another point about it. The chairman knows perhaps better than almost anyone else in Congress the way committees work and the way committees must work. Documents that have a relation to the Foreign Relations Committee, or that have relation to any other committee, must be examined in depth by that committee through its entire machinery.

To simply make it available willy-nilly to Members of Congress, I don't imagine there is a long line waiting to see it at the present time, but 435 persons looking at these documents separately will hardly digest their contents nor devise a means of applying them to the legislative process.

Our process works through the channels of various committees and utilizes the expertise which exists. We work as a team, rather than as individuals who may have a casual interest in the documents and may go by and look at them. So I think this is an entirely unsatisfactory method of proceeding. I would think that the far better method would be immediately to declassify those things that are presently known not to ever have deserved classification.

In court the other day we were told by the attorney for the United States that in 45 days they would engage in some review and reclassification or declassification. Why you could have done that in 45 minutes with respect to the two volumes that contain Presidential papers.

And after this lawsuit and after the review that has been given by two courts plus the U.S. attorneys working with the courts in camera, I would presume that somewhere around 95 percent of the total material could be taken out of the classification level immediately.

I would rather have that done and the remaining 5 percent kept in top secret status and denied to us than have the process which is suggested here.

Mr. Moorhead. I thank the gentleman. I would like to ask the gentleman to comment on another thought that has come before this subcommittee. It has been suggested that there be established either an independent board or a congressional board of expert classification personnel. It would advise the Congress so that, where there is an abuse of classification authority by the executive, we could have someone who could argue against it on our behalf. Such a board could review the papers which have been classified and insist upon lower classification or declassification. Finally, such a board could, where an individual or a newspaper receives a document that is classified in one way or another, that they think is ridiculous to be classified, be available to advise the individual or the newspaper or the like.

Do you see any interest in this kind of a procedure?

Mr. Eckhardt. Mr. Chairman, I think there is an interest in it. I really would like to think about it a little and look at how it works. I do have some doubts about it. It might create a pattern in which newspapers would feel that they really had to go to such administrative agency to judge whether or not they could proceed.

There are some things about our Government that seem to me to operate best by proceeding to reveal, protecting that process of revealing information almost absolutely, and then looking at the case as a case which has already been consummated, the facts have occurred. I have a tremendous respect for our common law system that deals with the facts which have occurred. And I am beginning to have less and less confidence in an administrative system that attempts to prejudge rules and nursemaid the press or anyone else. I am thinking of Gelhorn's book concerning the administrative process in which very serious second thoughts are expressed by a man whose views were extremely liberal toward agencies at an earlier time with respect to administrative process, but who has developed a certain cynicism toward it.

Mr. Moorhead. Thank you.

Are there any further questions?

Mr. Moss. I would just like to make an observation. I concur with you on two points. One, the conditions under which the House is receiving the documents makes them virtually worthless for the purposes of informing the Members of the House.

However, I don't feel any moral obligation to be bound by the conditions imposed by the executive. I have not agreed to them. And I have not delegated to any officer of this House the authority to agree on my behalf, nor has any other Member of this House.

If the presiding officer of this House has agreed to the conditions of the executive, he has bound only himself and no other Member of this body. There are no rules or regulations of this House, which treat classified information.

So I would regard the classification again as advisory to me, as a Member of Congress, but not binding upon me. And I would hope every other Member would so regard the restrictions suggested by the executive. The problem here is that one set of these documents for 435 Members makes it a virtual certainty that only one or two Members could possibly look at them with any thoroughness before the end of this session of the Congress. It is rather a meaningless gesture. It does perhaps salve the feelings of the Congress that it is a little more

equal, because it has one set. If the Congress really wants to use them, perhaps we should introduce a resolution to print them and make a set available to each Member of the House.

And this is within the powers of the House to do and might well be explored. There are other alternatives. I don't think we should just rely upon the resources of the press to inform us. Perhaps a little initiative on our own part might be helpful.

Would you agree?

Mr. ECKHARDT. Yes; I agree with the gentleman particularly with respect to the question of his not being bound except in an advisory manner. I would prefer, myself, to be better advised. When the entire set is designated top secret, I don't even have advice, I would like to know what they consider to be matters sensitive to the Nation. Then, on this basis I would know what I could talk about freely and what I should not reveal. This would be better, it seems to me, than to receive the entire set of volumes with the same classification.

Mr. Moss. Well, I have had documents before me classified top secret and upon examination discovered the only reason they were classified top secret was that serial number was part of an agency's marking system and it was classified.

The document content was not above the level of confidential. So I am accustomed to the excesses of caution resorted to in classification.

You don't have to have information that is classified; you can have just a system out of an agency that normally goes with classified information and the whole set will take that highest classification. The bulk of the material is undoubtedly unclassified in its original state.

And the other area of agreement—I seem to have forgotten the second point we were discussing there. The question you raised——

Mr. MOORHEAD. Procedure.

Mr. Moss. The procedure, yes, with respect to declassifying. I would never want to submit any of my rights to an administrative tribunal. There are enough of them subject to administrative action now, and I wouldn't want to give any of my first amendment rights to one.

So I would be very concerned over any action proposed in that direction. The courts better serve the people in handling appeals from the abuse of a system established by law.

Mr. MOORHEAD. Well, we thank you very much, Mr. Eckhardt, for your usual erudite and articulate statement. It was very thought provoking and we appreciate it very much.

I'd like to thank our colleague, the Honorable Michael Harrington, of Massachusetts, for a very excellent statement, too, which will be inserted in the record at this point.

(Mr. Harrington's prepared statement follows:)

PREPARED STATEMENT OF HON. MICHAEL J. HARRINGTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman and members of the subcommittee, first, I want to commend you for conducting these hearings. If you are at last able to dispel the shroud of secrecy hovering over the Departments of State and Defense, then you have performed your duty well.

As one of the newest members of the Armed Services Committee, I am constantly vexed by a system which stamps with regularity everything in sight either "Top Secret," "Confidential," or "Classified." All of this leads to a process where the most insignificant documents become vital to national security, and as Congressmen, forces us to make decisions in a vacuum. To put it an-

other way, Congress is no longer an equal partner in the American democratic process on par with the executive and the judiciary. Instead, we have become political eunuchs in matters of foreign policy and defense.

Merely by classifying whatever it chooses, the administration can bar a Congressman from taking an active role in his constitutionally granted powers. And when we try to reassert the role it lost to an increasingly powerful executive branch, we are told that any act of Congress would interfere with the President's power as Commander in Chief. That is what the administration asserted in its brief last week moving for dismissal of a suit which I and several of my colleagues brought against the President to end the war. To me, that sounds like the President is assuming dictatorial powers in determining the course of war and peace. I cannot believe, I refuse to believe our Founding Fathers ever meant the Constitution to be interpreted that way. Nor is that what I would call a strict construction interpretation.

The danger in classifying all these discussions in Armed Service Committee hearings is obvious. Without the broad forum, without the benefits of a broad forum, the committee preclude new observations. The committee has evolved into a closed group of men who think alike and bless nearly every scheme the military can come up with.

It creates a situation, and we have seen this come true, where the executive takes advantage of a passive Congress. And under the guise of national security, the executive bypasses the House and Senate in major treaty decisions. We now have some treaty with Laos, but only the Nixon administration knows what our obligations are. Who knows what our commitments are to Thailand? Rather than trust secret treaties to the Senate, the Johnson and Nixon administrations have gone ahead and written their own without seeking Senate confirmation. And the ultimate arrogance is when a Secretary Rogers or a Presidential adviser like Henry Kissinger refuses to appear before the appropriate congressional committee. Former Senator Joseph S. Clark, appearing before the Armed Services Committee not too long ago, raised that point. He was very pessimistic about the legislative branch ever being able to regain its rightful place in the Government. I would like to quote a portion of his testimony: "I think one of the great vices in the whole business of relationship between the executive and legislature today is the fact that there is this apparently unlimited power of classification of material which should never be classified at all," he said. "I don't know how you can get that changed unless you can get the Supreme Court to take it up, and my guess is that they won't do it." I would hope it wouldn't to have to go that far.

But the military, by its constant penchant for secrecy, erodes whatever public confidence it may ever hope to have. The military has been sharply criticized lately, but instead of offering candid explanations for its policies, it hides behind the cloak of "Top Secret." I asked Secretary of the Navy Chafee why dumping at sea or the problems of race relations in the service were stamped "Confidential." While he agreed that the Navy should make every effort to bring dialog before the public, he explained that parts of the document were classified so all of it was classified.

Again, I want to commend the committee for conducting these hearings, but I believe a joint committee is more pragmatic. A joint committee would present a unified congressional effort to finally remove secrecy from Government. I think this should be a standing subcommittee, composed of the members from the major House and Senate committees. I think this new committee should have the power of review as well to determine whether classified documents really deserve to be sheltered under a national security umbrella.

The publication of the Pentagon study has been a great public service, but these mistakes never should have been allowed to proliferate. History is fine, but if a mistake has been made, the discovery of that mistake 2 or 3 years later offers the country little solace. The mistakes have been made in Vietnam and they cannot be undone. But had we the benefit of all the information perhaps minds may have changed earlier. That is speculation, but there could have been fewer deaths—both American deaths and Vietnamese deaths, never mind the destruction we have caused and the urban decay which has spread through our neglect.

I am not calling for outright declassification of all Government documents, but I am suggesting there has been widespread abuse.

I realize this committee is concerned with the larger philosophical issues raised by the Pentagon study on the origins of American involvement in the Vietnam war, and not the court cases pending against the New York Times, the Washington Post, the Boston Globe, the Knight Papers, and who knows how many other newspapers within the next few days. I would like to point out, however,

that I doubt the Pentagon would have released this historical information on its own, as Secretary Laird says they now intend to do within 90 days. This sudden decision is a direct result of a free press. The role of the press has always been to arouse the public. A company paper, a timid paper, a paper which prints just what the Government wants it to, has no place in a free society. I cannot understand how the attorney-general and the lawyers who represent him, can argue as they have, for prior censorship. I believe, and the former chairman of the House Freedom of Information Subcommittee, Representative John E. Moss believes, and I quote him: "The Times violated no law and publication of * * * the report is very much a public service." I agree, but I would add the other papers which have published subsequent documents.

Art Buchwald, in a column this week, may have come across the real reason for the abuses of classification. If some general in the Pentagon wants to look important, he makes a suggestion and has it classified. Then, he shows it to another general who also feels important because he's in on the secret. Later, they both leak it to the press, so the newspapers will take their idea seriously. And, as was the case with the Pentagon study on Vietnam, classifying documents is the best way to prevent past blunders from ever seeing the light of day and prevents embarrassment. National security considerations, Buchwald concluded, amounts to just 5 percent.

I don't think there is any more that needs to be said except that it's time to clear away this secrecy once and for all. It is time to open Government so people will trust its leaders once again. Candor, not contrived excuses of national security, will restore faith in Government. The press did us all a favor this week. Let's hope it is not too late.

Mr. MOORHEAD. Before we conclude today's hearing session, I would like to call attention to tomorrow's schedule. We will begin our hearing at 10 a.m. in the same room to hear testimony from a distinguished panel of witnesses representing the public media, newspaper editors, reporters, broadcasters, book publishers, and the business press.

To our previously announced list of witnesses I add the name of Mr. John Callaham, vice president, editorial, McGraw-Hill Publications, who will represent the American business press.

The subcommittee stands adjourned until 10 a.m. tomorrow morning.

(Whereupon, at 4:45, the hearing was adjourned, to reconvene at 10 a.m., Friday, June 25, 1971.)

U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—THE PENTAGON PAPERS (Part 1)

FRIDAY, JUNE 25, 1971

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:15 a.m., in Room 2129, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, John E. Moss, Ogden R. Reid, and John N. Erlenborn.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; William R. Maloni, professional staff member; and William H. Copenhaver, minority professional staff, Committee on Government.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will come to order.

This morning we begin the third day of our hearings into U.S. Government information policies and practices.

The first day we heard from constitutional experts on our cherished freedoms and the constitutional right to know, including testimony from a former Justice of the Supreme Court.

Yesterday we learned some of the dimensions of the security classification system from a retired Pentagon expert.

Today we have as our witnesses a distinguished panel who will present expert testimony on yet another facet of the Government information crisis. All segments of the public media are represented here today on this panel, publishers, editors, reporters, broadcasters.

We regret that Mr. Davis Taylor, who was to have presented the view of the American Newspaper Publishers' Association, cannot be with us today as he was called home because of a personal tragedy. We hope ANPA will be able to supply testimony next week or to submit a statement for the hearing record.

Our panel from the media is made up of Mr. J. Edward Murray, vice president, American Society of Newspaper Editors and president-elect, former chairman of the Freedom of Information Committee; Mr. Richard P. Kleeman, chairman, Freedom of Information Committee, Sigma Delta Chi Society, correspondent, Minneapolis Tribune; Mr. W. Bradford Wiley, chairman of the board, Association of American Publishers, John Wiley & Sons, Publishers; Mr. Charles A. Perlik, president, American Newspaper Guild; Mr. J. W. Roberts, Washington bureau chief, Time-Life Broadcasting, chairman, Freedom of In-

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formation Committee, Radio-Television News Directors; and Mr. John Callaham, vice president-editorial, McGraw-Hill Publications, Inc., and American Business Press.

Before we begin the proceedings, I should like to place in the record a letter from the American Library Association and a statement on behalf of the American Library Association.

Without objection, that will be placed in the record.

(The letter follows:)

AMERICAN LIBRARY ASSOCIATION,
Washington, D.C., June 24, 1971.

HON. WILLIAM S. MOORHEAD,
Chairman, Subcommittee on Foreign Operations and Government Information, Committee on Government Operations, U.S. House of Representatives, Washington, D.C.

DEAR MR. MOORHEAD: On behalf of the American Library Association, may I respectfully request that the enclosed statement be made a part of the record of the hearings on U.S. Government information policies and practices of your subcommittee.

Copies of this statement are being sent separately to the chairman and members of the full House Committee on Government Operations.

Sincerely,

GERMAINE KRETTEK.
Director, ALA Washington Office.

Enclosures.

STATEMENT OF THE AMERICAN LIBRARY ASSOCIATION

The American Library Association is a nonprofit educational organization of some 30,000 librarians and laymen who are dedicated to the development, extension, and improvement of libraries as an essential element in the educational, business, and scientific life of the Nation.

The council of the American Library Association, the governing body of the association, on June 22, 1971, passed a resolution to "voice its full public support of the principle of freedom of the press and of the news media in their current battle to keep the American people informed of the actions of its Government."

The resolution was passed during the 19th Annual Conference of the American Library Association at Dallas, Tex.

This is the text of the resolution:

Whereas, the controversy between the Federal Government and *The New York Times, The Washington Post* and *The Boston Globe* has drawn into question the policies of the Federal Government relating to the classification and declassification of information; and

Whereas, the American Library Association strongly supports the right of the public to hear what is spoken and to read what is written; and

Whereas, the American Library Association believes that it is a gross abuse of the purpose and intent of security classification to suppress information which does not directly and immediately endanger the national security: Now, therefore, be it

Resolved, That the American Library Association endorse a full congressional investigation of the policies of Government relating to the classification and declassification of information to:

A. assure that such policies preserve the rights of the people;

B. guarantee that such policies do not operate to contravene freedom of the press;

C. protect the trust of the people in the integrity of their Government from being abused or exploited; and be it further

Resolved, That the American Library Association, in accordance with its declared policies on intellectual freedom, voice its full public support of the principle of freedom of the press and of The New York Times, The Washington Post and The Boston Globe, and any other news media, in their current battle to keep the American people informed of the actions of its Government, and that it communicate this to the President of the United States and to the news media.

We appreciate this opportunity to place this statement before the Subcommittee on Foreign Operations and Government Information, and will be pleased

to furnish additional information on this matter which is so important to the preservation of American democracy.

Mr. MOORHEAD. Gentlemen, it is our custom to swear the witnesses. We cannot do that until another member of the subcommittee has arrived, so what we will do, at that point we will suspend the proceedings and administer the oath retroactively and prospectively and I think that will keep us on sound legal grounds.

We will hear from all of the members of the panel in the order that I have listed, without interruption for questioning except possibly very narrow clarifying questions. Then we will have participation in a discussion between the subcommittee and the panel and among the panelists to elucidate any differences and clarify any suggestions.

So, Mr. Murray, if you will lead off, we will hear your statement in full and then after that Mr. Kleeman and so forth down the list.

Mr. Murray?

STATEMENT OF J. EDWARD MURRAY, VICE PRESIDENT AND PRESIDENT-ELECT, AMERICAN SOCIETY OF NEWSPAPER EDITORS

Mr. MURRAY. Mr. Chairman, the American Society of Newspaper Editors is very happy to appear before this subcommittee. I should explain that I am actually substituting for C. A. McKnight, of the Charlotte Observer, who is the president of ASNE and who could not be here.

I, myself, am without portfolio at the moment.

I am the former managing editor of the Arizona Republic and will be relocating in a very few days. The place, unfortunately, is classified at the moment.

Although I appear here today as current vice president and president-elect of the American Society of Newspaper Editors, I would like to make it emphatically clear that neither I nor anyone else can speak for the 725 directing editors who are members of our society.

The society was founded 50 years ago. One of the reasons for establishing it, as set forth in the preamble of its constitution, was that there was "no means of defending (the) profession from unjust assault." One of the objectives was "to maintain the dignity and rights of the profession."

I believe that newspapers have been under unjust assault during the last 2 weeks and I am here to defend the rights of the newspaper editor, which, not at all incidentally, are the rights of every American citizen.

Although the members of the society may agree on common objectives, you will see, on any given day, far-ranging disagreement on specific public issues with which their editorial pages deal, including some tangents of the basic issue before this subcommittee today.

I do believe, however, that every member of the society would stand with me in defending the 200-year-old constitutional tradition that every American—not just the newspaper editor—has the right to publish information in the public interest without prior restraint by Government, except in time of war declared by the Congress.

I would like to add one more disclaimer. I have not read all of the documents in the possession of the New York Times, the Washington Post, and the Boston Globe, the three newspapers that, so far, have been restrained from publishing by judicial decree. I do not know all

of their contents. Nor was I privy to the inner councils where, I am sure, many considerations, including national security, were weighed before a decision to print was made.

I am confident, however, that the men who made those decisions—and I know some of them well—are just as loyal, just as patriotic, as any man in this room or in the White House. And I am certain that these men felt a duty to provide the Congress and the American people with historical information essential to the decision-making process at a critical time in the Nation's history.

In his opening remarks on Wednesday, Chairman Moorhead referred to the "ultimate right of the people to know" and also to "the right of the people's representatives in Congress to know so as to carry out their legislative duties." As an editor, my immediate concern from day to day is the right of the average citizen to know. But I cannot stress too strongly my support for your efforts to obtain the full and accurate information you need if you are to represent the people wisely and courageously.

Now, I think it would be useful to review briefly the performances of newspapers and their editors and reporters.

First, I think it is important to note that the record of U.S. newspapers in protecting national security is a distinguished one, especially in time of war declared by Congress. The World War II censorship code, could not possibly have succeeded without the complete cooperation of the press.

The American Society of Newspaper Editors has long opposed overclassification and misclassification of Government information. This opposition culminated in the passage of the Freedom of Information or Public Records law adopted by this Congress in 1966.

Of course Congressman Moss and Congressman Reid and others were certainly the leaders in that fight.

As all of you know, those two Congressmen, Congressmen Moss and Reid, in their capacity as private citizens, are now using the Freedom of Information law to sue Melvin Laird for release of the Pentagon papers to the general public.

I realize that the critical issue before this subcommittee is security classification. I would hope that you would broaden your study, however, to include classification for other reasons having nothing to do with security. This is the biggest problem that newspapers around the country face as they deal with Federal agencies in their States and communities.

The society has also contended, through Democratic and Republican administrations, that the executive department, by excessive secrecy, has created its own credibility gap, which in turn has eroded public confidence in Government.

Now, let's look at a little history.

During part of the period covered by the McNamara papers, the 1967 report by our society's freedom of information committee, which I wrote and which the annual convention adopted, had this to say on the subject before us:

> Members of our commitee monitored the White House, the Pentagon, the Saigon military and the National Space Administration for breaches of faith with the public which might worsen the credibility gap between the Government and the people.

The White House is the main factor in the equation. And, although there has been some slight improvement in recent months (that is late 1966 and early 1967), President Johnson continues to hurt his image and his credibility by consistently trying to make the news sound or seem better than it is. This tendency, although evident with respect to many kinds of news, is most damaging in connection with Vietnam.

The war has escalated to the accompaniment of an almost unbroken succession of pronouncements that it was going in the opposite direction, or at least that something else was happening.

A year later, in 1968, the ASNE freedom of information committee was still complaining bitterly that the White House was misleading the people on Vietnam.

In a passage on the credibility gap, written by William B. Dickinson of the Philadelphia Bulletin, the 1968 report grants that there are times when a proper balance must be achieved between public candor and military necessity.

But then Mr. Dickinson added:

It is not so easy to justify the discrepancy between what the administration said happened in the Gulf of Tonkin in August 1964 and what actually did happen. The evidence is confused and contradictory. But even so it is obvious that there was involved something much more than a senseless, unprovoked North Vietnamese attack on two U.S. destroyers which were minding their own business and harming no one.

In presenting that story to the American people at the time, the administration did not reveal that these were ships on an intelligence mission. It did not admit then—nor does it admit now—that these ships were serving as decoys to district enemy attention from South Vietnamese raids on the North Vietnamese coast, but there has never been a convincing administration refutation of evidence to that effect.

I digress a minute to note that the Members of Congress who voted for the Tonkin Gulf resolution did so in full faith that they had been given the truth about the incident.

To quote Mr. Dickinson again, he said:

Still, it is possible to argue, as administration defenders do, that there are military considerations involved which make full disclosure impracticable. But what can be said in justification of these more recent administration maneuvers in the field of public information.

Then he listed, and I will only give you one of them, one of the maneuvers.

In November 1967, (Ambassador Ellsworth) Bunker and General Westmoreland returned to Washington to tell the country, using the White House as a sounding board, how the war was being won. They said that 68 percent of the villages had been pacified. They held out hope that by the end of 1968 some troops might be coming home. This was, of course, a propaganda effort, but in the light of subsequent events it exacerbated public suspicion of things the administration says about the war.

May I digress again to make this observation: The American people tend to put great faith in their President and in what he says. When he plays false with the people, as in the Vietnam war, and the newspapers report the truth, as they were doing in 1967 and 1968, the people tend to believe the President and disbelieve their newspapers. The resulting credibility gap is widened when other high officials of the Government indulge in calculated and sustained charges of bias, distortion, and untruth against the news media. I think our truth record in the Vietnam war is better than that of the executive branch, and I hope one byproduct of publication of the McNamara papers will be

to restore public confidence in the traditional axiom that you can believe what you read in your newspaper.

To conclude, the most fundamental first amendment issue raised by newspaper release of the McNamara papers is the right of the citizen to publish without prior restraint.

In practical terms, this right of the citizen often translates into the right of the editor to decide what the public has a right to know, the single exception being in cases where there is a clear and present danger to the national security.

It is just this right of the editor, unrestrained by anyone else in the society, to select and publish news which is the fulcrum on which a free and open society turns. Without it, all the other machinery of freedom, which makes representative government viable and self correcting, will come to a standstill.

So, my appeal is that the editor's right to decide not be denied nor abrogated in any way. This right cannot be nsurped by anyone, not even the President, and not even members of the judiciary, including the Supreme Court, and certainly not by other leaders in the society, without nullifying the first amendment.

Mr. MOORHEAD. Thank you very much, Mr. Murray.

Before hearing from Mr. Kleeman, the Chair would now like to administer the oath both retroactively and prospectively.

Would you gentlemen rise and raise your right hand?

(All witnesses sworn by the chairman.)

Mr. MOORHEAD. We will now proceed with Mr. Kleeman.

STATEMENT OF RICHARD P. KLEEMAN, A WASHINGTON CORRESPONDENT FOR THE MINNEAPOLIS TRIBUNE, AND CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE, SIGMA DELTA CHI

Mr. KLEEMAN. Mr. Chairman and members of the subcommittee, I, too, am representing a national president, Mr. Robert Chandler, the national president of Sigma Delta Chi, who was unable to be here today.

I am Richard P. Kleeman, a correspondent in the Washington Bureau of the Minneapolis Tribune and chairman of the committee on freedom of information of Sigma Delta Chi, the national professional journalistic society.

Our society, founded in 1909, has a membership of more than 21,000 journalists—professionals, professors, and students—in more than 200 professional and campus chapters throughout the United States.

The freedom of information committee, which was established in 1946 and of which I have been chairman since 1969, functions in various ways to defend freedom of the press—in which we include television and radio—and freedom of information.

Our committee's principal project each year is the publication of an annual report intended to summarize the problems and progress of the past year in the freedom of information field. A copy of our report for 1970 is in the hands of the subcommittee staff; in fact, the files of this subcommittee are an important source of information for a portion of the Washington chapter of this report.

We have promoted enactment of open-meeting and open-records laws in the States, and we collaborated with the former chairman of

this subcommittee, Representative Moss, in developing the 1967 Federal freedom of information statute. We are currently cooperating with other media groups in attempting to develop a bill shielding newsmen from harassment by subpena.

Much freedom of information work is done through the regional and local FOI chairmen of our society, but when we believe a threat to freedom of information is of national significance, our committee, with the prior approval of our national president, issues statements. On occasion, our society also joins in lawsuits where we believe freedom of information is at stake.

Notwithstanding the fact that the situation which precipitated these hearings was before the courts, our committee considered the issue of prior restraint so momentous and the freedom to print so imperiled that we issued a statement on the (then) New York Times situation on June 17, 1971. A copy of our statement is attached to these remarks, and I would hope that it could become a part of the record of these hearings.

Mr. Moorhead. Without objection, it is so ordered.

Mr. Kleeman. Mr. Chairman, by now your committee has heard from many governmental and legal experts, and you are to hear from many more. If I have anything to contribute as a member of this media panel, it would be as one of a few working reporters scheduled to testify before you. It is, I can assure you, an unusual—and not entirely comfortable—role for me. To begin perhaps somewhat negatively, I must mention a few recent comments to which our committee must take exception:

First, on the people's right to know: Our society is dedicated to the fullest exercise of that right, in the belief that only through knowing not only governmental decisions and actions but the process and rationale that precede them, can the citizen-voter act wisely. I think I can speak for the members of our society in saying that we could not be able to accept the essentially cynical and patronizing remarks by a retired military and diplomatic official who suggested recently that:

> A citizen should know those things he needs to know to be a good citizen and discharge his functions—not to get in on the secrets which simply damage his Government and indirectly damage the citizen himself.

It has also been said that recent revelations tend to increase citizen mistrust of Government and are, therefore, undesirable. We suggest that this is distorted logic: the mistrust results, we think, not from the fact that past decisions are now disclosed but from the fact that they are seen to have been so long concealed from or misrepresented to the people.

In passing, I would like to mention a reaction to the recent revelations which might be termed that of a "cynic's cynic"—to show, perhaps, how bad the situation can get— a former Congressman who said the disclosures did not particularly surprise him because he never assumed that, while in the Congress, he was being given full information on executive branch decisions regarding the Vietnam war.

Next, I would like to comment on a recent claim that freedom of the press and freedom of information have become partisan issues: as the current chairman of a committee that—under many chairmen before me—has been at least as critical of Democratic as of Republican

administrations on these issues, I find that view, now or at any time in the past, unwarranted.

Third, on the question of the Government's right to restrain publication in advance: our society would agree with the Hughes decision in *Near* v. *Minnesota* in 1931 that such prior restraint "is of the essence of censorship," and we reject the idea of Government censorship in all but the most limited of wartime, battlefield situations.

On the other hand, I do not believe there are many—if any—reporters, editors or broadcasters who are not sensitive to the occasional need for restraint—preferably by mutual agreement—imposed by the exigencies of national security. This concept also was dealt with in the 1931 Hughes opinion when it said that:

> No one would question but that a government might prevent actual obstruction to its recruitment service or the publication of the sailing dates of transports or the number and location of troops.

I think you would have to take those as merely examples of a class of information, rather than limiting it to those specifics. What I think the responsible reporter or editor would say is that the judgment of the effect of what he might write or publish in a security-sensitive area is but one of many judgments they are constantly called upon to make in gathering, editing, and publishing the news. What they do not want is a government—or a court—standing beside them saying, "Print this—don't print that."

The present situation is not by any means the first time—nor will it be the last—that highly classified documents have come into the possession of aggressive, enterprising newsmen. Perhaps half—maybe more—of what a good reporter writes consists of material that someone, in or out of government, would prefer not to see reported. Sometimes reporters having security-sensitive information elect to publish it—I would say most often they do—on some few occasions, they elect to withhold it, at least temporarily. But always the judgment should be independently made—and made in full awareness of the responsibility imposed by its exercise.

A high classification on a document does not cause the experienced newsman to say, "I must not print that." If, through whatever circumstances, such a document comes into his hands, its classification would alert him to the fact that he has potentially significant, and possibly harmful, information in his possession; that it should be analyzed with care, perhaps summarized or paraphrased rather than quoted directly; and that someone in an official position—rightly or wrongly—considered that disclosure of the information would be prejudicial. At this point, the newsman must, I think, ask himself—prejudicial to whom or to what?

To those who would cite the espionage laws as flatly prohibiting the media from publishing classified material, I would merely cite those first few words of the first amendment: "Congress shall make no law * * *"

That brings me to the general question of classification—a process I consider to be largely internal to the government affecting how a document is to be handled within governmental channels.

I had thought I would be suggesting something extremely original in proposing to your subcommittee that a system of automatic declassification be devised that would shift the burden on Government

officials from one of declassifying documents to one of deciding whether their classification ought to be continued after a certain time. I have found, as the members of this subcommittee already well know, that such a system exists already under Executive Order 10501, as amended. Thus, the principal problem—if one is to accept the so-far-almost-unanimous judgment of the courts that publication of the documents in question would not, with certain exceptions, damage national security—is that the automatic declassification system is either being ignored, is unworkable, or simply operates too slowly.

It is encouraging to see that the administration, under pressure of what one court has called massive leaks, is now moving to declassify much of the largely historical material in question.

Given the existence of a declassification system, and our general aversion to overlegislation in the freedom-of-press area, which is already under constitutional protection, our committee has no proposals for new legislation at this time. As I have said, I think we should consider possible revisions of the classification system to be an internal matter to be determined within the Government, between its legislative and executive branches.

The Government has said in recent days that it sought to prevent damage that would be irreparable. I think the question that those of us in the media must ask at this point is this: If a use of prior restraint should be vindicated, because some unpublished information is adjudged to be irreparably damaging, how soon will the next case occur? And the next? And the next?

And what other Government officials in what other day—perhaps men of less good will than those currently holding positions of trust—will seek to impair the people's right to know what their Government is doing—and for what reasons?

(The document follows:)

SIGMA DELTA CHI—PROFESSIONAL JOURNALISTIC SOCIETY,
Chicago, Ill., June 17, 1971.

Contact: Richard P. Kleeman, Minneapolis Tribune Bureau.

WASHINGTON, D.C.—The following statement was issued today by the Freedom of Information Committee of Sigma Delta Chi, national professional journalistic society (please, not fraternity) of more than 21,000 members:

Sigma Delta Chi has often spoken out forcefully for the constitutional right of news agencies to gather and to print or broadcast information, untrammeled by Government interference or censorship.

The society also has recognized that the national security and protection of the lives of U.S. citizens, in some few cases, may require that some information be temporarily and voluntarily withheld from publication.

In the New York Times case, involving publication of a report documenting U.S. involvement in Indochina, the society believes that, on the basis of what has been published so far, the apparent collision of the constitutional rights of a free press with the requirements of national security may have been greatly overstated.

The Times, through reportorial enterprise, obtained the report and began to publish articles about its contents, together with verbatim, textual excerpts.

The Government, pleading that irreparable damage to national security would result from further publication, obtained a temporary restraining order in the Federal courts, halting the Times' publication after the 3d day.

We are confident that, upon careful weighing of the issues involved, the ultimate decision of the courts will hold that first amendment rights of a free press are paramount in this case and will permit the Times to continue publication of its articles.

If so, perhaps no great harm will have been done, and the temporary delay may even prove beneficial by resulting in reinforcement of a constitutional

right and in rejection, once again, of any Government claim to a right of prior restraint on the publication or broadcast of news.

If the courts do not so rule, irreparable harm will have been done on both accounts. SDX would then carefully consider how it could best assist in minimizing such damage and in seeking reversal of what would be an unacceptable decision, and one setting a dangerous and alarming precedent.

For the present, while the matter is before the Federal courts, the society would simply raise these points:

1. Careful distinction must be drawn between damage to national security and endangering American lives, on the one hand, and possible embarrassment to governments, or to individuals now or formerly holding positions in government, on the other. An overriding concern, we believe, is the right of American citizens to be fully informed about the decisions of their government—and about the processes leading up to those decisions.

2. If Government security was so lax as to permit the Times to obtain a highly classified report, and if Government classification procedures are so questionable as to lead the Times' editors to conclude that the documents, largely historical, were too long overclassified and that no harm would result from their publication, then those editors must assume responsibility for publishing the materials. Rather than being blocked midway in the publication process, they should be prepared to bear the consequences if it is subsequently adjudged that damage did indeed result from the publication.

3. The Government's attempt to obtain from the Times the materials on which the articles were based must be viewed as a "fishing expedition," probably intended to trace the source of the documents given to the Times.

Since the Government has available to it all the material on which the Times articles were based, it cannot gain new knowledge from repossessing another copy.

And the only way the Government could asecrtain whether the Times would damage national security by what it intended to publish would be to obtain advance copies, not of the source materials, but of the articles themselves, together with accompanying textual excerpts.

This, of course, would be totally repugnant to all who defend the right of a free press to publish freely and thereafter to be answerable for what has been published.

Mr. Moorhead. Thank you very much, Mr. Kleeman. We would like now to hear from Mr. W. Bradford Wiley.

Mr. Wiley, you may proceed.

STATEMENT OF W. BRADFORD WILEY ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS

Mr. Wiley. Mr. Chairman and members of the committee, my name is W. Bradford Wiley and I am president and chief executive officer of John Wiley & Sons, Inc., New York, London, Sydney and Toronto, a book publishing firm founded by my great-grandfather in 1807.

My statement is being presented, however, on behalf of the Association of American Publishers of which I am chairman of the board of directors. Our 260 members publish more than two-thirds of the annual U.S. book production in this country. The United States is the leading book publishing nation in the world, both in domestic sales and in exports.

I welcome this opportunity to testify on behalf of our association and I commend this subcommittee for calling these hearings. For some months I have been increasingly aware of the rise in attempts to interfere with all forms of freedom as provided by the Constitution. At the opening session of the annual meeting of the Association of American Publishers in Washington on the evening of April 28 of this year I said:

Tonight I would like to speak very briefly of two texts I have selected from a great historical and living document, the Constitution of the United States. My first text is the preamble:

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the General Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

I am deeply concerned over whether our Union is being strained almost to a breaking point. Domestic tranquility is endangered; selfishness seems to have pushed aside our interest in the general welfare; our military power is not being used defensively; and the blessings of liberty are under attack in principle as well as in practice.

Four years after the Constitution was adopted it was improved by 10 amendments which we call our Bill of Rights. The first amendment, the most directly related to book publishing, is my second text:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

We do not have a state religion, and there are no restrictions on the freedom to worship. Churches are, however, under attack because their members and leaders have accepted broad humane responsibilities.

Efforts to interfere with the freedom of speech or the press in the form of legislation can and will be put down by the courts. The danger is that Government administrators and executives are difficult or even impossible to control until great mischief and harm have been done.

Administrative efforts to prevent peaceable assembly are widespread. I regret that there seems to be callous indifference to petitions from the people.

Ladies and gentlemen. I ask you to join me in an unrelenting effort to guard and preserve our rights and freedoms.

As book publishers we are trustees for the public in protecting the public's right to know under the Constitution. Our association, therefore, feels it has an obligation actively to intervene when first amendment freedoms are being threatened—whether it be by Federal, State. or local governments, or by executive agencies, legislatures or the judiciary. Let me comment on two recent examples.

CONGRESSIONAL INFRINGEMENT OF THE FIRST AMENDMENT

When the Investigations Subcommittee of the House Interstate and Foreign Commerce Committee on April 8 of this year subpenaed CBS to produce the "outtakes" of the CBS film, "The Selling of the Pentagon," the Association of American Publishers telegraphed Chairman Staggers on April 16 protesting this action as a violation of the first amendment. We said in part:

The Association of American Publishers is deeply disturbed by subcommittee's subpena to the Columbia Broadcasting System in connection with their documentary, "The Selling of the Pentagon."

As publishers, our members are committed to the proposition that it is in the public interest to make available the widest diversity of views and expressions, including those which are unorthodox, unpopular or critical of our Government and its institutions. We therefore regard as contrary to the public interest any attempt by the Government to suppress the free dissemination of ideas in any media.

We believe that the subcommittee's subpena to CBS for material not actually used in the broadcast, casts the long shadow of Government suppression over all the media and will, if allowed to stand, result in an even greater voluntary curtailment of expression by those who seek to avoid controversy.

We trust Americans to recognize propaganda and reject it. We do not believe they need the help of the Government in this task. Nor do we believe that

Americans are prepared to sacrifice their heritage of a free press in order to be protected against what the Government may think to be bad for them.

We believe suppression of ideas is never more dangerous than in a time of social tension. We affirm that freedom has given the United States the elasticity to endure strain and that the freedom of ideas keeps open the path of novel and creative solutions, and enables change to come by choice.

We believe that every silencing of a critical idea, every enforcement of an orthodoxy diminishes that freedom and our country.

We therefore urge in the public interest that you withdraw this subpena.

EXECUTIVE INFRINGEMENT OF THE FIRST AMENDMENT

On Wednesday, June 16, before we learned of the hearings to be held by this subcommittee, the board of directors of the Association of American Publishers adopted the following resolution:

The board of directors of the Association of American Publishers commends the New York Times for its courage and initiative in publishing the Pentagon documents concerning the history of our Vietnam involvement. We believe that the freedom to publish without prior restraint is of vital importance in maintaining the checks and balances that are the only basis on which our democracy can survive.

An affidavit certifying to our statement was introduced in the hearing on the Times case before the Federal Judge Gurfein in New York last week. Now, I would like to talk a little bit about things that happen outside of the United States which I believe to be pertinent to the problem of present publication censorship.

Most of the month of March this year I spent on a business trip to Brazil, Argentina, and Chile. In Brazil I accepted two invitations to lecture to groups of book publishers, one in Sao Paulo and the other in Rio de Janeiro. In the first lecture I was asked to discuss, compare, and contrast book publishing in the Western World with book publishing in the U.S.S.R. and in eastern European countries, which I have studied intensively on the spot. The second lecture, by request, was devoted to publishing problems of common interest between the rapidly developing book industry in Brazil and our relatively mature one. Before each of those lectures I had long sessions with the press. They persistently questioned me and asked me to comment on the censorship regulations, laws, and their application in Brazil. I was warned that if I did, I might very well be invited to leave the country. So I chose to reply indirectly by emphasizing in both of my lectures the remarkable record of freedom in the United States as provided by the first amendment, and the willingness on the part of book publishers to go to court whenever we felt infringements had been undertaken.

In the course of my lectures, I cited an internationally famous example of prior restraint from freedom to publish. Just before I went to the Soviet Union in October and November of 1970 as chairman of a delegation from the Association of American Publishers, Alexander Solzhenitsyn was awarded and eventually refused permission to accept the Nobel Prize for Literature. While we were in Moscow the vice chairman of the Association, Robert Bernstein, president of Random House, and I received during a visit to the Writers' Union a remarkable explanation of why Solzhenitsyn's prize-winning books, "The First Circle" and "Cancer Ward," had not been published in the Soviet Union. The former was refused for publication because it was "offensive to the military"—this of course is a remarkable statement

because there is almost no reference to the military in the book. His second important work, "Cancer Ward," was not published because by the time it was completed Solzhenitsyn had been expelled from the Writers' Union, which is tantamount to losing a license to publish. There is no doubt that censorship such as that in use in the Soviet Union prevents by its existence and threatening consequences what we in our country look upon as necessary, creative, critical writing of either a literary or political nature.

In Argentina and Chile, in meeting informally with the publishers' associations in those countries, I again emphasized the importance of freedom to publish, and the local press featured my remarks. In retrospect, that in itself is an interesting commentary on freedom to publish, for in Argentina the Government was about to fall, and in Chile important municipal elections were about to be held.

During my extensive travels throughout the world in pursuit of my company's business and professional interests, or as a representative of the U.S. Government in various capacities, I have observed that there is very real corollary between freedom to publish and the quality of literature and commentary on public affairs. Wherever censorship exists creative writing is of little or no consequence. We must not permit that to happen to us.

Thank you.

Mr. MOORHEAD. Thank you very much, Mr. Wiley, for an excellent statement.

The subcommittee would now like to hear from Mr. Charles A. Perlik, president of the American Newspaper Guild.

STATEMENT OF CHARLES A. PERLIK, JR., PRESIDENT, AMERICAN NEWSPAPER GUILD, WASHINGTON, D.C.

Mr. PERLIK. Thank you, Mr. Chairman, gentlemen. I am Charles A. Perlik, Jr., president of the American Newspaper Guild.

The American Newspaper Guild is the union which represents some 35,000 employees working in the news and editorial and commercial departments of newspapers, news magazines, and wire services in the United States, Puerto Rico, and Canada.

The American Newspaper Guild, as the only national organization of working newspapermen in the United States, has worked since its founding in 1933 to maintain and extend the right of the press to publish, and to protect its information and its sources of information, without Government hindrance or interference, not only in the United States, Canada, and Puerto Rico where our membership is situated, but also in other countries of the world through the International Federation of Journalists, of which I am vice president for North America.

Internally—within the Guild itself—this principle is reflected in article II, section 1, of the ANG constitution, which reads:

> Guild membership shall be open to every eligible person without discrimination or penalty, nor shall any member be barred from membership or penalized by reason of age, sex, race, national origin, religious or political conviction or anything he writes for publication.

And, of course, we supply emphasis to the latter qualification.

Externally, since the Guild's founding nearly 40 years ago, this principle has been advanced by the ANG and its local unions in a

continuing series of actions at the National, State, and municipal level and in repeated policy expressions by our annual conventions, the most recent of which, adopted by our 1970 convention last year in Seattle, is entitled "Access to News" and reads, in part:

> There is considerable doubt whether full and accurate information about the war in Indochina is being made available to the working press and thus to the public.
>
> There are also indications that newsmen in the war theater do not have free access to reliable news sources and are at times hindered or discouraged from using their own methods of news gathering.
>
> Therefore * * * be it resolved that Government officials of the United States and Vietnam take whatever steps necessary to assure newsmen full access to information so that they can provide an accurate and reliable flow of information on the Indochina war to the public.

Working newspapermen, I need hardly emphasize, have an immediate and direct interest in the maintenance and application of the first amendment guarantee of freedom of the press in our society and bring a unique body of knowledge and experience to bear on the conflicts that periodically and inevitably arise under it.

It was in recognition of this fact that several years ago the late Scripps-Howard editor and columnist Lowell Mellett, who also headed the Office of Government Reports and was an executive of the Office of War Information during World War II, left the American Newspaper Guild a bequest to be used to explore ways of encouraging press responsibility without impairing press freedom.

The bequest was utilized to establish the Mellett fund for a free and responsible press, an independent, nonprofit corporation which subsequently initiated, through financial grants, six experimental press councils. An evaluation of the councils is to be published later this year in a book being prepared under the supervision of Dr. William L. Rivers of Stanford University.

Today our constitutional guarantee of freedom of the press faces its most serious challenge in memory, if not, indeed, in our history as a Nation.

And I am happy to be able to report to you this morning that the response of the Guild, and of a number of its principal local unions, to the attempts by the Federal Government to suppress publication of the Pentagon papers has been immediate and unanimous in support of the newspapers involved and publication of the Pentagon papers without censorship.

The texts of the local statements are appended to this statement, but I should like to quote briefly from each.

The elected officers of the Newspaper Guild of New York, which represents employees of the New York Times as well as other New York City newspapers, said, in part:

> That a topic of such overriding importance to the people of the United States should be threatened with advance censorship runs counter to the guarantees of freedom of the press and certainly counter to our traditions and history, in which the most serious issues have always been considered in public debates.

The executive board of the Washington-Baltimore Newspaper Guild, which represents employees of the Washington Post as well as the Star, Daily News, and the Baltimore Sun papers, said, in part:

> The executive board of the Washington-Baltimore Newspaper Guild wholeheartedly supports the New York Times and the Washington Post both in their fight against prior restraint on publishing—that is, censorship—and in their more basic struggle on behalf of the public's right to know * * *

The Washington-Baltimore Guild's board also said:

It is profoundly saddened by the tragic irony that the attempted subversion of one of the freedoms for which generations of patriotic Americans have died is being carried out by a Department called Justice in the name of national security.

The executive board of the Detroit Newspaper Guild said, in part:

As newspapermen and women, we are deeply alarmed over these attacks (by the Nixon administration) on the public media * * *. We commend the New York Times for publication of the series, and support the full freedom of the press to probe, to measure, and to expose the operations and policies of all public institutions.

The executive board of the North Jersey Newspaper Guild said, in part:

The North Jersey Newspaper Guild, which recognizes that the security interests of the United States are meaningless if there are no basic freedoms to secure and preserve, such as the right to a free press, supports the New York Times and the Washington Post in their fight for a free press.

Finally, in a statement I issued as president of the American Newspaper Guild on June 17 describing the sense of outrage felt by myself and, I am sure, thousands of other Guild members, I said, in part:

There is no way to describe the restraining order with which the Government forced suspension of the New York Times' publication of stories, documents, and materials about the United States' pre-1968 involvement in the Vietnam war other than as the Times itself described it editorially on Wednesday: "An unprecedented example of censorship."

And the Government's companion and subsequent efforts—first to force the Times to turn over to it all copies of the documents on which the series is based and subsequently to force the Times to allow it to "inspect and copy" the documents—fly squarely in the face of another right championed by the Guild for the past 37 years: The right of newsmen to protect their information and its sources from forced exposure—a right whose constitutionality is presently being tested before the U.S. Supreme Court * * *.

History—both before and since the American Revolution—makes it clear that when the Constitution's first amendment says "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *" it allows no prior restraint on what may be published. This ought to be especially evident to an administration which professes a "strick constructionist" view of the Nation's basic legal document * * *.

The New York Times is to be applauded for its resistance to the administration's efforts to censor what it may publish, and the Guild offers all the support it can to help the Times win this battle against censorship.

I am pleased at this time to extend this offer of Guild support to those other publications that now are also involved in this battle.

I do not believe it is necessary for me to rehearse for this committee the constitutional and sociological arguments against Government censorship of the news in a free society such as ours; they already have been set forth ably and eloquently in the briefs of the defendants and in the opinions of certain of the judges in the Pentagon papers cases.

But, at the risk of belaboring the obvious, I should like to emphasize three points that I am afraid all too often are lost sight of by the very public whose freedoms the first amendment was designed to insure and protect.

The first point is that the first amendment's guarantee of freedom of the press was not intended to create a special privilege for newspapers and newspapermen but to insure that the public may be in-

formed of what its Government is doing in its name and be free to express itself thereon, for good or ill.

The second point is that the concept of prohibition against prior restraint on publication as the irreducible minimum guarantee of a free press is neither original nor new, but dates back to the old English common law that was so largely reflected in our own written Constitution nearly 200 years ago.

The third point, which is a corollary of the first, is that just as the public has the right to know about the operations of its Government, so do its elected representatives in the Congress.

Once the public's right to know is abridged by Government censorship of the press and denial of information to its elected representatives, two consequences are inevitable, both of them equally disastrous to a free society.

We become, to the extent of that abridgment, less of a representative democracy than we profess to be.

And the credibility of the press and, more importantly, of the Government itself, is destroyed.

This is not to say, of course, that the Government does not sometimes need to act in confidence and even classify some of its papers against disclosure, particularly in matters involving the national defense.

But any system for the classification of such documents (1) must be narrowly defined and responsibly applied, (2) must insure periodic review and declassification, and (3) must provide for effective challenge of, and relief from, the decisions of those officials who have the initial responsibility for administering it.

The present system, reformed and improved though it has been in recent years, does not meet these criteria. Classification has been imposed on some information unnecessarily, and on other information mistakenly, and the Government has not been above uilizing it to attempt to manage the news. It is, as the Washington Star said in an editorial last Tuesday, "an unholy mess."

It was less than a dozen years ago, to cite one small incident, that the Pentagon tried to maintain the secrecy of what was public knowledge—that monkeys were being used in space flights. One monkey that had ridden a rocket in 1952 had been living since 1953 in an appropriately labeled and prominently placed cage at the National Zoo. The classification of this information was defended on grounds that its release might damage U.S. relations with India, where some religious sects which worship monkeys might object.

Affidavits from working newsmen and former working newsmen in the Pentagon papers cases—like Murrey Marder, reporter for the Washington Post, Benjamin Bradlee, the Post's executive editor, and Max Frankel, chief of the New York Times Washington Bureau—speak eloquently of the regular uses made of "leaks" of classified information by Government officials, including those in the highest elected office.

Mr. Chairman, I would like to intersperse here two paragraphs from an analysis of the situation written by Richard Harwood which appeared in yesterday's Washington Post. He had this to say:

The substance and in some cases the precise details of virtually everything the Washington Post and the New York Times have printed from the Pentagon

papers is ancient history. It was nearly all published while it was happening and it was largely a futile enterprise. Neither the public nor the congressional politicians were listening. On the contrary, it is obvious in retrospect that various factions in the administration were deliberately and consciously leaking top secret plans and recommendations in order to build support for future U.S. actions.

Senator Muskie said last weekend he intends to propose legislation to create a permanent, independent board to review all documents that have been classified for as long as 2 years. Board members, he said, would serve substantial, nonrenewable terms, with one member from the press, one from the Government, and five from private life. The board would be empowered to make public any document classified for 2 years and could, at any time, make classified documents available to appropriate congressional committees.

We commend Senator Muskie's proposal to the Congress and the administration for serious consideration. We would suggest that it be amended to specify that the burden of proof for the maintenance of classified status on any document be placed squarely on the classifying agency—similar to the burden of proof requirement in the 1967 Freedom of Information Act—and that any document for which such proof is not made or offered be declassified automatically. We would further suggest that press representation on the board include representation from the ranks of the working press, where attempts at free press abridgment are always felt first.

Under our system of Government, based as it is on a delicate system of checks and balances between legitimately contending interests, classification and publication must remain separate questions, however—the first regulated by law, the second protected by the first amendment.

The U.S. Court of Appeals for the District of Columbia, in ruling against the Government's request for a preliminary injunction against the Washington Post last Wednesday, suggested, as did the U.S. Supreme Court in Near versus Minnesota some years ago, that there conceivably might be occasions justifying prior restraint on publication, for example, of current information on wartime battle plans, troop movements and the like. Defendants in the Pentagon papers cases have conceded as much, and indeed it would be foolhardy to deny that hypothetical possibility.

It would be equally irresponsible to forget, however, that voluntary press censorship has served our Nation well during wartime, without the necessity of prior restraint on publication, and can be expected to continue to do so in the future. Newspapers, like the Government, have their own systems of internal checks and balances that serve to restrain them from precipitate action.

In conclusion, let me say that, in any discussion of first amendment rights and Government restraint, such as this one, it cannot be emphasized too often and too strongly that dissent is not to be confused with disloyalty.

"In a democracy dissent is an act of faith," Senator Fullbright said some years back. "Like medicine, the test of its value is not its taste but its effects, not how it makes people feel at the moment but how it inspires them to act thereafter.

Criticism may embarrass the country's leaders in the short run but strengthen their hands in the long run; it may destroy a consensus on policy while expressing a consensus of values.

Many of us, Mr. Chairman, believe that is precisely what is happening now.

(The attachments to Mr. Perlik's statement follow:)

RESOLUTION BY THE OFFICERS[1] OF THE NEWSPAPER GUILD OF NEW YORK, ANG LOCAL NO. 3, ADOPTED JUNE 16, 1971

The Newspaper Guild of New York, whose members both as citizens and employees of newspapers have a close and intimate interest in maintaining free and open discussion of all public issues, views with dismay the attempt by the Department of Justice to suppress the stories being run by the New York Times concerning the involvement of the United States in the war in Vietnam. That a topic of such overriding importance to the people of the United States should be threatened with advance censorship runs counter to the guarantees of freedom of the press and certainly counter to our tradition and history, in which the most serious issues have always been considered in public debate.

The Newspaper Guild of New York therefore supports the stand of the New York Times in fighting off any attempt by the Department of Justice to say what should or should not go into its columns and urges instead that the Department support and reinforce the freedoms contained in the first amendment of the Constitution.

STATEMENT OF THE EXECUTIVE BOARD OF THE WASHINGTON-BALTIMORE NEWSPAPER GUILD, ANG LOCAL NO. 35, ADOPTED JUNE 19, 1971

The executive board of the Washington-Baltimore Newspaper Guild wholeheartedly supports the New York Times and the Washington Post both in their fight against prior restraint on publishing—that is censorship—and in their more basic struggle on behalf of the public's right to know what is contained in the suppressed articles.

The board admires the managements of the two papers for committing large resources of energy and money into a fight on behalf of a freedom as old as our Nation.

The board is profoundly saddened by the tragic irony that the attempted subversion of the freedoms for which generations of patriotic Americans have died is being carried out by a Department called Justice in the name of national security.

STATEMENT OF THE EXECUTIVE BOARD OF THE DETROIT NEWSPAPER GUILD, ANG LOCAL NO. 22, ADOPTED JUNE 17, 1971

The Federal Government's attempts to kill the New York Times' publication of the McNamara study of Vietnam policymaking seem to us the climax of the domestic war being waged by the Nixon administration against the right of Americans to know.

As newspapermen and newspaperwomen, we are deeply alarmed over these attacks on the public media. The credibility gap will grow in direct proportion to the efforts of those in power to hide their own mistakes and to suppress the information which the citizens of a democratic Nation must have.

We commend the New York Times for publication of the series and support the full freedom of the press to probe, to measure, and to expose the operations and policies of all public institutions.

RESOLUTION BY THE EXECUTIVE BOARD OF THE NORTH JERSEY NEWSPAPER GUILD, ANG LOCAL NO. 173, ADOPTED JUNE 20, 1971

The North Jersey Newspaper Guild which recognizes that the security interests of the United States of America are meaningless if there are no basic freedoms to secure and preserve, such as the right to a free press, supports the New York Times and Washington Post in their fight for a free press. The North Jersey Newspaper Guild furthermore opposes efforts of the U.S. Department of Justice to prevent publication of the Pentagon study.

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[1] President; first, second, and third vice presidents; executive vice president and secretary-treasurer of the local, plus the ANG international vice president representing the New York boroughs of Bronx, Manhattan, Queens, Brooklyn, Richmond, and the counties of Westchester, Nassau, and Suffolk.

AMERICAN NEWSPAPER GUILD,
Washington, D.C.

STATEMENT BY CHARLES A. PERLIK, JR., PRESIDENT, AMERICAN NEWSPAPER GUILD ON CENSORSHIP OF THE NEW YORK TIMES

The progressively more brazen moves of the Nixon administration since Monday not only to impede but to prevent the U.S. press' exercise of its constitutionally guaranteed freedom to publish the news have brought to my office and my person a growing sense of outrage—an outrage shared, I am sure, by other leaders and members of the American Newspaper Guild.

I am outraged not only as president of the American Newspaper Guild—the union which represents some 35,000 newspaper, wire service, and news magazine employees in the United States, Puerto Rico, and Canada—but also as a former newspaper reporter and as a U.S. citizen who holds most dear the very clear and unambiguous constitutional prohibition against governmental interference with the press.

There is no way to describe the restraining order with which the Government forced suspension of the New York Times' publication of stories, documents, and materials about the United States pre-1968 involvement in the Vietnam war other than as the Times itself described it editorially on Wednesday: "An unprecedented example of censorship."

And the Government's companion and subsequent efforts—first to force the Times to turn over to it all copies of the documents on which the series is based and subsequently to force the Times to allow it to "inspect and copy" the documents—fly squarely in the face of another right championed by the guild for the past 37 years: The right of newsmen to protect their information and its sources from forced exposure—a right whose constitutionality is presently being tested before the U.S. Supreme Court.

U.S. District Judge Murray I. Gurfein is to be applauded for today refusing to allow a Government "fishing expedition" (his words) into the Times' files by flatly rejecting the Justice Department's request that the Times also be ordered to allow the Government to "inspect and copy" any other documents it might have in its possession.

The Government's stated reliance on the espionage law in obtaining a temporary suspension of the Times series appears to rest on thin authority, at best.

History—both before and since the American Revolution—makes it clear that when the Constitution's first amendment says "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *" it allows no prior restraint on what may be published. This ought to be especially evident to an administration which professes a "strict constructionist" view of the Nation's basic legal document.

We are certain that when Congress passed the espionage law its intent was not to seek to apply it to the press in contravention of the first amendment.

There can be no question of the right of the U.S. press to publish anything, once the decision is made by it to do so.

As Sir William Blackstone put it in pre-Revolutionary days:

"The Liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press * * *"

As the Washington Post put it editorially today: "A press that can be formally prevented by Government from printing what it will—forbidden in advance to print it—is no more than a tool of Government and one that can be used as the Government may wish to deceive and mislead."

The New York Times is to be applauded for its resistance to the administration's efforts to censor what it may publish, and the guild offers all the support it can to help the Times win this battle against censorship!

Mr. MOORHEAD. Thank you very much for your excellent statement, Mr. Perlik. Without objection, the documents attached to your statement will be printed in the record.

The committee would now like to hear from Mr. J. W. "Bill" Roberts, Washington bureau chief, Time-Life Broadcasting.

Mr. Roberts.

STATEMENT OF J. W. ROBERTS, WASHINGTON BUREAU CHIEF, TIME-LIFE BROADCASTING, AND CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE OF THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

Mr. ROBERTS. Thank you, Mr. Chairman. Thank you and the members of the committee for allowing me to appear here.

I am chairman of the Freedom of Information Committee of the Radio-Television News Directors Association, an international organization of nearly 1,000 members, who are involved in supervision or preparation of broadcast news programs.

I should say I am not speaking for the NAB nor the RTNDA, but simply expressing my personal views on the questions raised by the subcommittee.

I believe your subcommittee is most wise in studying these freedom of information problems now, because I have never known a time when such a suffocating climate of suppression hangs over the journalist.

The court injunctions forbidding some of the Nation's outstanding newspapers to publish information those papers believe it necessary for the public to know is only the latest, but most serious, in a long chain of events harmful to freedom of the press.

I don't want to get into a lengthy discussion of the issues raised by the injunction against the New York Times, because other members will be going into that. I want to concentrate on the unique problems the broadcast journalist faces. Every broadcast journalist with whom I have talked believes the court injunction suppression of news a most dangerous new precedent in chipping away the safeguards of the first amendment to the Constitution.

The Government has, in deciding to seek the injunction, done serious harm to the voluntary approach which has usually settled the questions of news reports involving matters of national security.

It seems hard to believe the Government can raise a question of national security now when in days of serious harm to the national security, World War I and World War II, journalists were allowed to make their own decision as to what confidential material to make public. Certainly I can't see any existing threat to the national security equal to the world war days.

The Government also has taken a most intriguing move in delivering those 47 volumes of the McNamara study to Congress. The Government says it is doing it because there is such a danger that Congress would make judgments on the basis of what the Government calls "incomplete data" and "distorted impression" from the documents published so far that it had to deliver them to Congress. But it seems to me there is just as much danger that the public will reach judgments on the same faulty basis. Why, therefore, shouldn't the public have a right to know what the Congress needs to know in order to do the job?

I would hope the committee also considers other legal problems, those involving subpenas both from the Federal and State and local government.

The U.S. Justice Department has been attempting to force newsmen to serve as Federal investigators, by issuing subpenas for confidential information, including films and tapes in various cases in-

volving demonstrations, or operations of organizations like the Black Panthers. More and more state and local prosecutors and defense attorneys are doing the same thing, with a resulting curb on freedom of information. It is hard enough to persuade a source who wants to remain anonymous to talk on film or on audio tape even by masking faces or electronically distorting voices. Subpenas which allow outside legal forces to uncover those sources simply persuade those sources never to talk again and the public loses vital information on community problems.

The Radio-Television News Directors Association is backing legislation in Congress, which would protect newsmen from such subpenas.

Broadcast journalists, moreover, have some special concerns in the courts. Our cameras, microphones, and recorders are barred from most courtrooms, usually on the grounds that they would intrude or create a circus effect. Yet the entire trial of Senator Robert Kennedy's convicted assassin, Sirhan Sirhan, was televised, without incident, and without noticeable problems. Unfortunately, the public which had a vital nationwide interest did not see it. The judge ordered that the televised hearings be shown only to newsmen and legal students. Allowing broadcasting of trials—especially those of deep public interest—might help restore public belief in the fairness of our judicial system, now under serious criticism from many areas of American society.

The freedom of the broadcast journalist has been clouded from the very beginning of broadcasting, when the Federal Communications Commission was created and instituted the 3-year license renewal requirement. It is hard for anyone who doesn't work under the 3-year license renewal system to understand what an effect it can have on the free flow of news through radio and television stations.

The Federal Communications Commission custom, when it receives complaints about unfairness in broadcast news programs, is to send the complaints out to the licensee, asking, "How do you answer these?" The broadcaster, usually with costly legal advice, has to spend considerable time in investigating the complaints and answering them. The policy has the effect of inhibiting good reporting, since it tends to discourage all but the most dedicated and courageous broadcast journalists from digging into stories of major interest. It is almost a truism that the more thorough the job of reporting, the more persons will be angered, insulted, or will complain of unfairness.

So the FCC policy does tend to inhibit thorough news coverage. The FCC maintains, in case after case, that it does not want to interfere with editorial judgment and with news decisions. That it does not wish to censor or to judge handling of news.

Yet these statements have come only after major FCC investigations, such as the probe into the question of whether the WBBM–TV pot party was staged. And as to whether the networks were fair in their coverage of the 1968 Democratic Convention. And many more. Each investigation simply convinces some broadcasters that the safest way to get their licenses renewed every 3 years is not to make waves. Not to do a good job of reporting, not to stir up complaints, by exploring their communities' problems. Not to get into controversial issues. This contributes to the climate of suppression.

But in the past 5 years, two other arms of the Federal Government have reached into this field.

Another House subcommittee, the Special Subcommittee on Investigations of the House Interstate and Commerce Committee has spent a good deal of its time in investigating broadcast journalism. It, too, probed the WBBM–TV pot party documentary. And came up with some proposed legislation to forbid "staging" of news. A bill was introduced in the House which would have made it a Federal crime to stage news for radio and TV news programs. It died without hearings. But the mere fact that a subcommittee of Congress considered it had a right to regulate broadcast news—that contributed to a climate of suppression.

Another subcommittee is now engaged in a contest with the CBS network over the TV documentary, "The Selling of the Pentagon." And has issued a subpena for all CBS film and documents involving the program, which CBS is resisting on traditional journalistic grounds that only news material which has actually been broadcast should be open to subpena.

The subcommittee has long wanted to get the authority to examine material not broadcast. It had proposed in its now-defunct bill on staging news that each station keep all film and tapes involved in news open for Federal inspection for 6 months. And this subcommittee isn't the only instance of congressional activity threatening the freedom of the broadcast journalist. Shortly after "The Selling of the Pentagon" was aired, a bill was introduced called the "Truth in News Broadcasting" bill. This would make it a Federal crime to broadcast anything but the full truth in news programs. A broadcast journalist would be forbidden from editing, altering, rearranging, or staging any film, or tape report of an event, or from editing, altering, rearranging, or staging any interview, unless each report was accompanied by a visual or verbal statement to the audience that such material had been altered, edited, rearranged or staged.

Anyone familiar with broadcast journalism knows material has to be edited in order to be presented on the air if it is an actual live broadcast.

You may agree that this is an extremely dangerous legislative proposal, but the sponsor of this bill actually had six co-sponsors the last time I checked.

I cite all this to indicate that there exists in Federal Government today, a growing feeling that the Government should determine what the journalist reports, not the journalist.

Unless that trend is reversed, our system of democracy just won't be able to function. And we will have government by propaganda, instead of government by information.

Thank you.

Mr. Moorhead. Thank you very much, Mr. Roberts, for an excellent statement.

The subcommittee would now like to hear from the final member of the panel, Mr. John Callaham, vice president-editorial, McGraw-Hill Publications, representing the American Business Press.

STATEMENT OF JOHN R. CALLAHAM, VICE PRESIDENT, McGRAW-HILL PUBLICATIONS CO.

Mr. CALLAHAM. Thank you, Mr. Chairman.

My name is John R. Callaham. I am appearing today in behalf of the Editorial Committee of the American Business Press. I am vice president-editorial of McGraw-Hill Publications Co., which publishes some 35 specialized business publications and Business Week.

The membership of the American Business Press is composed of leading specialized business publications which have a deep and direct interest in a free press, freedom of information, and responsible reporting. Among the members of the American Business Press are publications I am sure many of you know very well: Iron Age, Aviation Week & Space Technology, Oil and Gas Journal, Machine Design, to name but a few.

We thought it would be useful to consider some effects of the dispute which has arisen from the Pentagon papers incident. In the first place, there seems to be a direct confrontation between the principles of the first amendment and the Government's classification system. This is not to say that all Government business has to be conducted in public. On the other hand, we feel that neither current nor historical records should be kept from the public through the device of overclassification, or by the same token, of underdeclassification.

We are not directing our interest to the clear responsibility of employees of the Government when they undertake Government employment. We are directing our attention to what happens when information like the Pentagon papers, for whatever reason, falls into the hands of newspapers, broadcasters, magazines, book publishers, or business publications. What then is the responsibility of the press? What then are the requirements of the first amendment?

It would seem to us, and that's why these hearings can be so important, that out of your deliberations, among others, can come some useful results, such as:

1. A positive reaffirmation of the principle that if information comes before an editor, that editor always has the right to exercise editorial judgment as to what he should or should not print. I think Judge Gurfein in his opinion in the *New York Times* case on June 19 wrote eloquently in stating:

> The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. In this case there has been no attempt by the Government at political suppression. There has been no attempt to stifle criticism. Yet in the last analysis it is not merely the opinion of the editorial writer, or of the columnist which is protected by the first amendment. It is the free flow of information so that the public will be informed about the Government and its actions.

2. Reaffirmation of the principle that it is the duty of the press always to make studious inquiry and to report responsibly. It certainly is not the desire nor the intention of the business press to injure national security. Neither should national security be used to build a fence behind which embarrassing material can be kept under cover.

The clash, of course, comes in determining who is going to be the judge. In the instant case, after the articles were printed and before additional segments were serialized, the Government sought to exercise prior restraint through injunctive relief. The uselessness of this remedy is apparent from the rash of stories which appeared thereafter in a series of newspapers other than the New York Times. Thus, if national security were truly involved, then injunctive relief and prior restraint are not the answer and cannot be practically employed because they are totally ineffective in silencing every newspaper, every radio station, every television station, every general magazine, every business publication, and every book in the country.

We, as business paper or specialized editors, feel that far too often Government departments classify documents to protect themselves from public scrutiny. The information classified may be embarrassing, but not necessarily damaging to the Nation's security. If we could pinpoint the difficulty we would say that the classifiers are the judges, not independent third parties. And Executive Order No. 10964 rests the power to classify or declassify with the department that originally classified the material.

In our opinion what is needed is more periodic or continuing review of classification practices, not by the agency that did the original classifying, but by an independent, objective, critical agency or group. Take the Times case itself. One approach would be that followed by the Times: Receive the information, make an editorial judgment as to whether publication will hurt the interests of the United States when considered in the light with first amendment considerations, and then reach a decision to publish or not to publish.

Under our checks and balances system, Congress, independent of the executive branch, administers independent agencies like the Library of Congress and the General Accounting Office. An agency like either of those could be entrusted with two responsibilities:

1. To advise or determine what should be declassified without request of the press or of any individual.

2. Upon request of the press or of an individual, to determine whether or not release of classified information to the public, consistent with the public's right to know, would in fact injure the security of the Nation.

If we had a permanent independent advisory entity of the stature and objectivity of the Roberts or Warren Commission, composed of men and women of impeccable reputation, representing the executive and legislative branches of the Government, as well as leading public figures in and out of the press, the present conflict between the first amendment and the national security almost certainly would have been avoided. And certainly the dangers of continuing overclassification and of underclassification should be considerably lessened.

Thank you very much.

Mr. Moorhead. Thank you very much, Mr. Callaham, for your very interesting statement and fascinating proposals.

Because Mr. Reid has to catch a plane to New York, I yield to him first.

Mr. Reid. Thank you very much, Mr. Chairman.

I would like to most warmly welcome the members of the fourth estate that are here today, Mr. Murray, Mr. Kleeman, Mr. Wiley, Mr. Perlik, Mr. Roberts, and Mr. Callaham.

First, I agree with the thrust of what you have said, and I think it is true that in America today the press is under the most serious assault that we have witnessed in this century. It is not just a question of prior restraint; it is the attempt to subpena reporters' notes and, of course, the use of the licensing power to intrude on first amendment rights and to try and confuse TV outtakes with the same kind of thing a newspaper might do by cutting on the stone, both of which I think is an improper intrusion of the FCC and of the Congress.

So I am delighted to listen to what you have said and the clarity with which you have expressed your positions and that of your organizations.

I would like to first ask a general question about the right to publish. We are now, I believe, in the period that represents 9½ days where part of the press of the United States has been denied a fundamental right which I think should admit of virtually no exceptions. If any exception is to be granted at all, it would seem to me there would have to be a clear and present and extremely major danger. And even there I am not satisfied that there should be any right of prior restraint.

What I would like to ask you, Mr. Murray, do you believe it is correct either for the newspapers or indeed perhaps for the courts as a matter of principle to use prior restraint merely to evaluate whether or not something is so serious that restraint on publication should be exercised? I think if we start to do that then the Government can come on almost any issue and say there is a matter that is very serious, and the publication of a newspaper is enjoined during the pendency of that evaluation.

If that became a general principle or practice, it seems to me the press right as of that point would be imperiled, whether or not the decision was affirmative in upholding prior restraint.

Would you care to comment on that, Mr. Murray?

Mr. MURRAY. There are several issues in the question that the papers have had to face. The first important one was the New York Times decision as to whether or not they would print in face of the injunction. And they and then the Post and then the Globe successively all decided that they could not print in the face of the injunction. And obviously I do not speak for them, and I do not know why they decided that. But in the same situation I would have made the same decision and the reason would have been that the newspapers, my newspapers, those I have worked for, naturally work within the system, and you stand for law and order. And if the courts rule, you have to obey. But I think only to a point where freedom of the press is this seriously threatened.

I think the problem of printing in face of the injunction, as you say after 9½ days, really never came to issue for the simple reason that the Times, after a few days, saw that the Post printed and then the Globe printed and then the Knight newspapers printed and then the Los Angeles Times and the Chicago Sun Times and now the Baltimore Sun.

So the newspapers I think have a very proud record of the last 2 weeks of facing up to the issue of prior restraint in a most sensible kind of way. I do not know—that is my main comment on it. I do not know what the decision would be in case there was not the safety valve of the other newspapers continuing to do it. I think it would always depend on the case.

If the New York Times, for instance, to take them simply as a typical example, since they did break the story, if they had thought, you see, that the immediacy of the material that they were printing was much more urgent—these are historical documents, 1968—if it had been a different kind of information that had been restrained, it seems to me it might have also been a different kind of decision in face of the injunction.

Mr. REID. Thank you. I raise this because I have growing concern over the delays and what this might mean as a possible precedent for the future.

Mr. Perlik, I thought your second point on page 7 was excellent, the concept of prohibition against prior restraint on publication as the irreducible minimum guarantee of a free press. That is a point that is extremely well taken. Would you agree that if there be any prior restraint that it would have to be not, as in the present case, a matter of embarrassment, or a matter of history, but a matter of extremely clear and present and major danger?

Mr. PERLIK. Without question, Mr. Reid, it would have to have those limitations and we are bedeviled as everyone is in trying to draw that line, where that line might exist. I am afraid we would have to feel that if an error were to occur it should occur in favor of the first amendment and not in favor of prior restraint.

Mr. REID. Mr. Roberts, as you know, Mr. Moss and I are trying to proceed through the Freedom of Information Act, basically to help insure the public's right to know, not just the congressional right to know, because we feel that fundamentally this material is not even so sensitive that it has to be handled with any great care by the Congress and quite obviously should be made available completely to the American people.

I would hope that you might want to comment briefly about the Freedom of Information Committee's using this statute more often. I hope the public and the press will use it, because the burden lies with the Government and the principle is that disclosure is the rule, not the other way around. I hope this statute along with other remedies can be used more in the future.

Mr. ROBERTS. Mr. Reid, it has been used. Several of our members have made use of it. The beautiful thing about this is even the threat of going to court usually is enough, and so far none of our members have had to file suit to get information. They have been able to do it without going to court because the information was made available.

Mr. REID. I would like to mention the suit, *McGrain* v. *Daugherty*, because I think it relates in a sense both to the Congress and the press and it relates to the power of inquiry, and it also relates to the power to have access to the news in the same sense I believe.

This was a decision in 1927, but it said—

> The power of inquiry with the power to enforce it is an essential and appropriate auxiliary to the legislative function.

It was so regarded and employed in American legislatures before the Constitution was framed and ratified and actually an act of September 3, 1789, in the First Congress held that Congress had the right to get material respecting all matters.

The one I would like to raise is the broad question of accountability. It seems to me that both the press and the Congress serve under the

clear responsibility of helping to insure the accountability of the executive to the American people. That presupposes access, it presupposes the press and the Congress make judgments on what represents security and what does not, and that we take action to insure the free flow of facts, otherwise our system just does not work.

I think when there has been dereliction, as I believe there has been in the Executive, failure to inform the American people and a failure to inform the Congress on basic changes in Vietnam policy, as well as the circumstances that were referred to in testimony this morning about the Gulf of Tonkin and the destroyers being on an intelligence mission, that accountability should be one of the principles that governs.

And I hope that we can come up with remedies, if necessary, if they be needed, both in the area of classification of documents, with the Congress assuming authority in this area that I believe we possess, and, if necessary, with a constitutional amendment to insure that the Executive is held accountable in a reasonable and responsible way.

Would anyone care to comment on the principle of accountability?

Mr. Murray. I am not sure that this is a pertinent comment, but I remember that when the freedom of information bill was passed the most important—the two most important aspects of it were the fact that the burden of proof was on the agencies, and the fact that there was a court test.

Now, the way that works in practice is—the bill as we all know, I think, has worked well, as Mr. Roberts said, when it is tested it works well. But the burden of proof on the agencies, they are not accountable, and that is why I make the comment.

I wonder if there is any way to make the agencies more responsible for undertaking the burden of disclosure instead of just sitting there, as they have done. I mean the Pentagon in the case of the 47 volumes of history, for instance, in which nobody who has seen them can find an iota of threat to national security, that is one problem of accountability.

Mr. Reid. Let me interject there that under the statute—Mr. Moss and I had a little something to do with it—there are penalties. I think the notion should gain currency that the executive can be brought before the bar of justice and penalized for improperly classifying and improperly withholding information from the American people and the Congress in their responsibilities congressionally or first amendment right-to-know protections. And for a long time the executive thought they had the sole right to classify and that there was no possible penalty if there was misclassification, particularly concealment. And there I think we enter an area of dereliction. And perhaps this is an area the press can be vigorous in supporting and the Congress can do something about as well.

Thank you very much, Mr. Chairman.

Mr. Moorhead. Thank you, Mr. Reid.

I think that Mr. Perlik set forth as well as could be the situation that faces us today when he said, "Our constitutional guarantee of freedom of the press faces the most serious challenge in memory if not indeed in our history as a Nation." We appreciate that statement very much.

I am intrigued with Mr. Perlik's support, in general, of the Muskie type of solution to this problem we face and also with Mr. Callaham's proposal.

Mr. Callaham on page 4 spoke of an agency like the Library of Congress or the General Accounting Office, with, as I understand it, two responsibilities. One would be to examine all classified documents—I suppose after a certain period of time—and determine whether they should be classified lower or declassified.

Is that your suggestion, Mr. Callaham?

Mr. CALLAHAM. Mr. Chairman, with one exception, I think it would be virtually an impossible task for any committee or group to examine all documents day-by-day. But to keep an overview, a watchdog, critical, critiquing attitude toward the practices of an agency and at its own instigation or perhaps the instigation of the public or the press or anyone else to look into the classification practices and principles of that agency and then to make recommendations that it is perhaps going too far overboard in this area, or that its practices look okay, and so forth.

Mr. MOORHEAD. Make spot checks.

Mr. CALLAHAM. They could make spot checks, but not decisions on day-by-day, paper-by-paper examinations. I think that would be impossible. But the very threat of someone breathing down their necks would help the agencies to stay realistic and openminded.

Mr. MOORHEAD. Then you say the second thing would be to establish a procedure where upon the request of the press or an individual to determine whether or not a particular piece of classified information should or should not be classified?

Mr. CALLAHAM. That is right.

Mr. MOORHEAD. Would you not agree with me that this should be advisory in nature only, that if a newspaper or broadcaster determined that even with the contrary advice and after considering the pros and cons that they would still have the rights they now have to publish?

Mr. CALLAHAM. Absolutely, sir. Advisory in every capacity: Advisory to the agencies, to the public, to the press, to everyone.

Mr. MOORHEAD. I yield to Mr. Moss.

Mr. MOSS. I was going to ask for a reaction, Mr. Chairman, to perhaps permitting the agencies to classify, but if a classification of top secret was to be maintained for a period of more than 2 years, they would have to secure the sanction of whatever independent board or commission was established for review.

If a classification of secret or confidential was to be maintained on the document for a period of more than 1 year, they would also have to have the concurrence of the reviewing agency. Spot checking does not impress me as being too effective. You can find many estimates of the mass of documents? The estimate yesterday I believe was 20 million. We had an estimate a few years ago of about 6 billion.

So I don't know how many there are. With "Q" clearance documents over in Atomic Energy, I think probably some of the first documents classified at the time of the development of the Manhattan project are still classified. And I have no doubt that material going back at least to the Revolution is still classified in the Pentagon.

And this might be a way of breaking some of it loose and perhaps

reducing the cost of maintaining needless documents in the executive branch of Government.

What would your reaction be to that kind of a procedure?

Mr. Moorhead. Do any members of the panel want to comment? I would like to have comments on the Callaham or Muskie proposal as amended and I think improved by the Moss amendment.

Mr. Wiley. Mr. Chairman, it is quite obvious when you have a group of people representing the press and publishing, you will never have agreement. I choose to take the view that the problem begins at the point of accountability.

I have an inherent dislike or distaste for regulatory bodies unless they are absolutely necessary. It seems to me that if you begin at the point of accountability, there is perhaps a solution, that if I exercise the right, if it is mine, in whatever branch of the Government I am engaged, to classify a document, I should be required to put my name and that date and the reason for that classification on there. And it would then automatically, within my own organization, come up for review, even if I had to put on as well as my name and the date, my judgment at that time as to how long that document should be in the realm of classification.

My personal experience inside of the Government was very short, about 2 years during the war when I was a civilian in uniform in the Navy Department, and I was alternately fascinated, amused, and annoyed by the artificial systems of classification then in use for reasons that seemed most unreal and also much more seriously interfered with the work that I was expected to get accomplished in the interest of the publishing programs necessary for such things—let me give a specific example: Defense against kamikaze attacks. Everything that was done was done by men of good will, but the result, for lack of judgment, was very, very bad.

So I would like, myself, not to see any regulatory body that doesn't already exist, and I would challenge those that exist, if they interfere with proper progress.

Thank you.

Mr. Moorhead. Does anyone else wish to comment?

Mr. Perlik. Mr. Chairman, isn't the heart of the matter, no matter what administrative structure is established around a classification system, a question of whether automatic declassification is provided?

It seems to us that the central thing is that the document after a certain period of time, loses its classification unless the body which classified it in the first place rejustifies the need to continue the classification. Whatever administrative machinery is employed or empowered to do that, to perform that function, would start with that fundamental essential concept. The material becomes public information unless there is continuing, compelling reason for it not to be.

Mr. Moorhead. What would your time frame be in your judgment? Mr. Moss mentioned 2 years for top secret. I can see something that really should be declassified sooner than that, but we couldn't put an automatic 30 days on it.

Mr. Perlik. I am not sure time alone should be the controlling factor. That immediately opens up the situation to judgment and repetition of the evils we already see. But you can conceive I think of circumstances where classification should endure beyond 2 years.

The point is to take the decision out of the hands of the agency that did it in the first place, I think.

Mr. MURRAY. Mr. Chairman, I am troubled by the numbers involved in this thing. If you have tens of thousands of people doing classifying, and you try to set up a review board structure, how many people do you need on the review board, and what are you talking about in terms of cost?

So I come back too to the accountability thing and in some way to control the classifying in the first instance.

Mr. MOSS. I think you would not need a large number of persons on a review board. The mere fact that the classifier would have to go to someone outside of his agency for approval to extend classification in my judgment would reduce the requests or would reduce the extensions by at least 99 percent.

Mr. MURRAY. Mr. Congressman, you remember when we got the 10501 change——

Mr. MOSS. I do indeed.

Mr. MURRAY. Way back when, we thought this was a victory, because there was going to be review from the top, from the President, and so on. And it didn't work that way.

Mr. MOSS. That is right.

Mr. MURRAY. Now isn't the review board likely to suffer the same fate?

Mr. MOSS. That is why I suggest a board completely outside of the executive department. I think it would have to be a totally independent board. I do not trust the executive department regardless of the political makeup of it.

For one thing it has a very large career bureaucracy with a vested interest in not unsettling anything—don't rock the boat; you are much safer to operate in obscurity, and that can be achieved through the application of a security stamp.

And that is why everything from the airline schedule to the newspaper clippings of today are classified at levels clear up to top secret. And they continue. They don't put on the downgrading automatically as they should. Some agencies do. Some don't. It is very spotty. Then it means they are to be reviewed, but they are not reviewed. I don't think there has been any bona fide attempt made to review them since the amendment to 10501 was made back in 1959.

We did get rid of about 30 agencies, the Migratory Bird Commission, and the International Boundary Commission, and I think the Battle Monument Commission—a few like that no longer have the right to classify. But there are still too many agencies having that authority. And I think unless we impose automatic downgrading you shouldn't have the classification secret after 1 year or top secret after 2 years, unless you come forward and justify it to an independent group.

This is too important to leave to the executive departments and agencies. After all, they generate the informtaion. Frequently they make the mistake. They have a vested interest in not disclosing. But the public has a vested interest in knowing what they have done. At some point the public ought to be able to know all they have done. It is very important that we devise a method to achieve that objective.

Mr. CALLAHAM. Mr. Chairman, I would like to make two brief comments.

First, in relation to the very interesting comment Mr. Wiley made about forcing an agency or individual to make periodic reviews. I am not sanguine as to the effectiveness of that, because I don't think it is human nature for any agency or of any individual to be objective about reviewing his own decisions, his own prior decisions.

Therefore an effective review system has to be something once-removed from the original decision. I was very much interested, and I agree with Mr. Moss that it would not have to be a large board and that it should not be burdened with mundane decisions and so forth. The very presence of an outside independent, critical watchdog type of committee, I think, would have a salutary effect. As a member of the business press, I am familiar only with the problems we have, and we see or we think we see—we are not sure because we don't know, by definition—but we think we see literally mountains of stagnant information gathering in the bureaus because agencies are functioning, it seems to me, in three respects simultaneously; legislative, executive, and judiciary. They make the decisions, that is they legislate what is to be classified and what is not to be classified; then they execute or carry out their own orders; and if these come under question, then they sit in judgment on their own decisions.

It isn't human nature for such a system to work, because it cannot be objective. No human can be objective under those conditions. So we see a possibility of some independent, objective board that would be at the beck and call of responsible citizens or that would on its own initiative look into these practices and the perhaps overextensive use of classification by certain agencies. The Defense agencies and related agencies are the ones we have talked about here, but there are others—the Commerce Department for instance. Within each are examples of what we think are ridiculous classifications, and the rigidity of the system that makes it virtually impossible ever to get anything declassified.

And anyone who is interested in the possibility of getting something declassified is at a disadvantage, because he doesn't know the nature of the material half of the time, or more than half of the time.

Mr. Moss. Don't you think the departments and agencies have developed a proprietary attitude toward information and they ought to regard it as a custodial responsibility and nothing else?

Mr. Callaham. Right.

Mr. Roberts. Mr. Chairman, I worked for 30 years under the regulatory agency control of the FCC. I don't like regulatory agencies any more than Mr. Wiley. But I think that in this board or commission idea you are getting at the real heart of the problem. This is the fact that the classification is put on within the department and maintained within the department with no one outside able to make independent judgments.

It is the independent judgments that really count. This would give a chance for the independent judgment to operate in deciding whether the material really should be secret or not. I think it is a very valuable idea and one that would be extremely valuable to me as a newsman.

Mr. Moorhead. Mr. Erlenborn.

Mr. Erlenborn. Thank you, Mr. Chairman.

Let me first say that each one of these statements express broad principles with which I can agree most wholeheartedly. The greatest

possible freedom of speech and press I think is most desirable. I think the people's right to know, however, is also protected by having a devil's advocate in every proceeding, and so though I agree with just about everything you have said, I think maybe someone other than a friendly inquisitor who plays the role of the devil's advocate may help the people's right to know.

With that as a basis for my questions, I would like to ask a few of what might be tough questions, in the full knowledge, of course, that if these conditioning statements are not reported either in the paper or on TV or radio, they may sound altogether different than they are intended.

First of all, let me say that I think each one of you has expressed that you are for the broadest possible freedom of the press, but you do admit there is some limitation. Freedom of the press, the Supreme Court has said, as to freedom of speech, is not unlimited, there is some limitation.

Would you agree with that?

Mr. MURRAY. I would.

Mr. CALLAHAM. Yes.

Mr. ERLENBORN. So we are not talking about a completely unregulated freedom. Or license, which is I think the way you would describe a freedom that has no limitation.

Would you say that the system of classification of documents, top secret, secret, confidential, is in itself a prior restraint?

We have been talking about prior restraint in terms of a court injunction to prohibit publication. Isn't a classification system itself a prior restraint?

Mr. KLEEMAN. I don't believe so, Congressman Erlenborn, because I think as I tried to make the point in my statement that I would at least consider that classification to be an internal matter within the Government and not particularly binding on the press or media.

Mr. ERLENBORN. If it is accompanied with, as most people believe it was—I guess maybe there is some question now—criminal sanctions for those who violate the classification, isn't it a restraint?

Mr. MURRAY. It hasn't been in the last 2 weeks, because those papers are all classified.

Mr. ERLENBORN. No one has been prosecuted yet. I understand there is a grand jury looking into it right now and there may be some indictments. Isn't that correct?

Mr. MURRAY. I agree with Mr. Kleeman that the press has been trying to break classification since I can remember but in wartime has been quite responsible. Some of us who were war correspondents had a lot of experience with that kind of thing. But we tended to try to find out as much as we could.

The business of Eisenhower is famous, he found if he told us everything, we would stop looking and we would be just as responsible. And this was a device. But I think the answer of Mr. Kleeman is right, that classification really technically is not a prior restraint on the press.

Mr. ROBERTS. In fact sometimes, Mr. Erlenborn, I think it might be a stimulus.

Mr. ERLENBORN. Again, in the light of the people's right to know—I certainly agree with that—is it within the province of the publisher

to have his own internal classification system to make the material on which he bases his story unavailable to other publishers or to the public? Witness the resistance to the subpena to get to the background information on which a television show or news story may have been made. Does this in some way interfere with the people's right to know?

In other words, is it Government only that has to have a free flow of information, or does this right to know extend to the publishing world as well?

Mr. MURRAY. Well, it interests me, this question, because I tried to make clear in my statement that the rights involved here are the rights of the citizen to publish and not just the right of the editor or publisher. But when you ask, "Does the publisher himself have a set of rules or restraints of his own, all publishers and editors have their own standards for selection and they do exercise them and in this sense," it is a question of exercising judgment.

I don't know—see again you use the phraseology "prior restraint." Or his own set of restraints. They are not really restraints, are they, if they are self-imposed?

Mr. ERLENBORN. I don't think you are really responding to the question.

My question is: Does the right to know extend to some other publisher or editor or the public to get to the background documents on which the publisher has made his judgment? If you are going to have a complete right to know, and freedom, free flow of information, should we, for instance, know whether the pot party was staged, whether the question that was answered on the "Selling of the Pentagon," for instance, was as alleged, a different question than appeared on the program?

Mr. MURRAY. Let me finish.

There are two questions here. The publisher—there is a question of competition as far as the publisher not making the material immediately available to everybody else until he gives it to his clientele. I mean there is that issue. But the pot party issue—Mr. Roberts knows more about this than I do—but this comes to the subpena thing, "The Selling of the Pentagon," that is a different issue. The subpena problem, the press objects to that, because it has a chilling effect on sources.

Mr. ERLENBORN. I understand that.

Let me make one other statement though and then I will be happy to hear from Mr. Roberts or Mr. Perlik.

You are protecting your sources, I understand that is a principle. I can understand the reason for it. Does not the Government sometimes try to protect its source? I think it was Mr. Orr Kelly in the Star, one of the columnists in the Star the other night, made the point that the newspaper profession, in trying to protect their sources, is very blithely denying to the Government its right to protect its source, or those privileged communications between governments and so forth. In other words, is this a one-way or two-way street?

Mr. ROBERTS. It is a two-way street in my opinion. But the question involved in source material is whether the access, the public access to that source material will mean actually a lessening of the public's knowledge by drying up the sources? This is the whole problem that we face when we are forced to reveal sources that we feel or know will then disappear as news sources.

Mr. Erlenborn. But your answer, I think, to the question then would be, from what you say, that we do not have the right to go back behind what was shown on television to get a complete display of the information, but only to that part that was shown on the half hour program?

Mr. Roberts. Yes. Because what is involved in what is shown on the program is editorial judgment and when you get back to look at what went into that editorial judgment, then you are indeed, if you are the government, interfering very seriously in the process of getting free information to the public freely, because you are really putting the government in the editor's seat.

Mr. Wiley. I think the same thing, sir, applies in the case of books, but in a different time span. I am not talking about novels, where a highly personalized presentation is involved, perhaps with political overtones, but the broad category of nonfiction for a great variety of purposes.

The publisher's responsibility, insofar as I have performed it and our publishing house—and I don't think we are atypical—you must make certain that one, the man is a man of integrity, regardless of whether you agree with his political views, that what he has said is as clearly presented as it is possible.

It is factually correct insofar as humanly possible. In all of these categories, we all resort to the same procedure. We have regular advisers select at random advisers who are permitted the privilege of being anonymous, and are asked to prepare a critique. We may give them leading questions. But we do not think that information, which leads us to counsel the author, who at all times has the ultimate right to decide whether he will take our advice. Our counsel to an author, we do not think that is a matter of public interest or concern. It helps us to reach an editorial decision. Sometimes it may lead to a direct confrontation between the critic and the author when the issues become so complex, by mutual agreement. They then discover they have been friends for 20 years, and sit down and fight it out, and we leave it to the author to decide in the end what he will accept in the way of criticism.

I don't care whether the author has a different political point of view. And I don't know whether our authors are black, yellow, red, or anything. It is immaterial. The important thing is I stand responsible for the decision to publish or not to publish.

Mr. Kleeman. I am not sure, Mr. Erlenborn, that I would buy the idea that it is a two-way street in the same basic way in which I think you intended the question. I think what makes the two ways ultimately, perhaps, is the responsibility of the editor for what he prints and for what is laid before the public. This he is accountable for. But I don't think that the first amendment is written as a two-way street, and I don't believe it runs that way.

Mr. Erlenborn. Mr. Murray, on page 1 of your statement you said that the editor "has the right to publish information in the public interest without prior restraint by Government, except in time of war declared by the Congress."

On page 5 you say "the public has a right to know, the single exception being in cases where there is a clear and present danger to the national security."

Now, I wonder if these are meant to express the same thing? Would you say that there could be a clear and present danger to the national security only in time of war declared by Congress?

Mr. MURRAY. No; I meant to get them both in. That is a good point, the statement is not quite clear.

I mean to get them both in though.

There are times—the Vietnam war is undeclared, which made the whole thing entirely more problematical for the press than World War I or II. Nevertheless, I said the press had a distinguished record in national security and believe me in connection with Vietnam it has. And there are all kinds of other instances. But I mean to use both, because I think that editors are responsible in terms of, especially in terms of national security.

As a matter of fact, although I didn't put it in the statement, editors are quite responsible in terms of lots of other things, human life, for instance, the question of jeopardizing human life is always—we don't always publish, you know, crank scares and all kinds of thing that we think might be threatening to somebody else.

Mr. ERLENBORN. You would agree the restraint runs not just during time of war, but to anything that would endanger the national security, whether it be during time of declared war or not.

Mr. MURRAY. You see that gets——

Mr. ERLENBORN. I am trying to figure out which you mean. Is the testimony "danger to national security" or is it only "during time of declared war?" Because you have said both.

Mr. MURRAY. But the logic is not bad there. There may be a little lack of clarity.

The second one says "clear and present danger" and you can state that in various ways, imminent and so on. But the problem is there in the second instance, that it be an extremely important case and imminent and so on.

Mr. ERLENBORN. Realizing that the freedom of the press is enjoyed by all, the editor of the Daily Worker as well as Time-Life and the New York Times, would you say for instance, in a case like during the Korean war, it was not a declared war, we had troops there as part of the U.N. forces, that an editor, any editor, would have the right to make a judgment as to publishing troop movements and things like that?

Mr. Roberts?

Mr. ROBERTS. May I give you an example, Mr. Erlenborn, which involves the New York Times and President Kennedy and the Cuban invasion. Perhaps you remember that.

The New York Times had the information that the United States was backing a clandestine operation to invade Cuba. And the Times was going to publish it. And the Kennedy administration found out about it, and called the Times and persuaded them in the national interest not to use the story. They didn't use the story. And that was a clear indication of editorial judgment.

I think, myself, personally, this is probably one of the reasons why the Times went ahead and published the documents now, because in hindsight it would have been better had they gone ahead and published in terms of public interest.

Mr. Erlenborn. You know there is a saying in the legal profession that hard cases make bad law, so that is why I am asking the toughest kind of question.

Would you say that that freedom of the press extends to the editor of the Daily Worker, that he should have the same right to make those judgments on the invasion of Cuba or Korea? I guess you would have to.

Mr. Roberts. I wish he had.

Mr. Murray. My answer is yes, he has to have the right too.

Mr. Wiley. There is another thing that ought to be said from the point of view of a book publisher, and that is the atmosphere of unreality. When we talk about 47 volumes of material suddenly becoming available to the public, but under the suspicion this is a violation of top secret, it is hard for me as an ordinary book publisher who knows what 47 volumes look like, to imagine how someone, if there are a limited number of sets of the document, could just pick up 47 volumes and walk out. He is picking up a 150-pound package—and 150 pounds of books, if you ever tried to carry them, is quite a burden.

The whole thing doesn't have an air of reality. And this I think points to the danger of artificial classifications sustained for artificial periods of time.

Mr. Erlenborn. I thoroughly agree with you and I hope one of the results of the present controversy will be a good look by Congress at our classification laws and ways to free up information. That certainly is what I think should come from this.

But I think there are many difficult questions to answer in this area. I am not certain that we have asked them all or had answers to all of them. But I think your appearance here today certainly has been helpful to all of us.

Thank you.

Mr. Moorhead. Mr. Callaham, the business press probably has a great deal of experience in dealing with technical and scientific types of Government information. Could you give us some case history involving security classification and information problems in this field?

Mr. Callaham. Yes, sir, I can quote from my own experience, going back a number of years. I have no reason to believe that it would differ substantially today. I was invited by a rather high official in a Government agency to visit a certain plant and was told that I could write about whatever I saw, because he would see to it that I would not see what I shouldn't write about, and that I could print whatever photographs he allowed me to take. I took notes and wrote my story. It just happened that another high member of the same agency was in our office about the time that I had finished this and he heard about it and he wanted to see the material and the photographs.

He first asked me how come I was there in the plant, and what I was doing there. I said I had an invitation from his agency. "This is a distinct violation of the Security Act," and so forth, he said. He asked for my notes and my photographs but then would not give them back. He said, "This is a distinct violation of security," and he said he would look them over and then get in touch with me. He never did.

This was a very disturbing thing, to have two top officials of the same agency at loggerheads with each other. My eventual decision was to go ahead and publish my story. I never heard from anyone about it.

There was another case of a publication I know, just a few years ago, that through its own initiative and at its own expense obtained some exclusive photographs of Russian helicopters, and published them. A defense agency official said that he would like to study them and so he asked to borrow those photographs. And they were then immediately stamped top secret and he refused to give them back—even though they had already been published.

And there are several instances from the same publication where published stories have been ripped out or torn out of the publication, put in a file and stamped "top secret." There are also some instances where every fact, so far as we know, in a story has been cleared and declassified, open, so to speak, but then suddenly the entire story itself becomes classified. So it isn't always a rational process.

And we find, as I say, not only the Defense Department, but other departments sitting on information. We don't always know what they are sitting on; we wish we did. It is not the cases we know about that worry us; we can usually get that information. What bugs us are the cases we don't know about and that stay there perhaps forever and no one ever discovers them.

I am dealing principally in technical information that on the surface looks picayune. Yet, it may be highly significant to some segment of industry. Some technical information on a new material used in the space agency might be of utmost importance to our metalworking industry, to our chemical industry, to the drug industry, to machine tool industry, if only they knew about it and could make independent judgments as to whether it was or was not valuable to them.

So those are some of the instances that I know from personal experience.

Mr. Moorhead. I think we in the Congress feel the same as you do. If we know about a fact or a document, we can go after it. It is the ones we don't know about that we can't go after.

Mr. Callaham. May I add a word, please?

I am dealing with technical information almost on a daily basis. Any one bit of it, or any one segment of it, is not particularly momentous. In order to get it, it just seems impractical to me to go through a court case (except in very, very rare instances) because of the time lag, the expense, the undue delay, the formidable circumstances. So the classification itself is a deterrent to our further pursuit unless we have a pretty good handle on its importance and can go after it immediately and directly.

Mr. Moorhead. We have been focusing mostly on security classification, but Mr. Murray says in his statement on page 3, "I would hope that you would broaden your study to include classification for other reasons having nothing to do with security."

Can you tell me what you mean by that and particularly what difficulties you have had that the Freedom of Information Act could not be used to help you?

Mr. Murray. Well, I don't think that I was referring to the last part, that the Freedom of Information Act is not useful there. But I was referring to something I said in the comments later on the big agencies, although they have the burden of disclosure, simply don't accept the burden. And there have been repeated cases of that in which the press had to go to the Veterans' Administration to try to

get some information on hearing aids declassified and made public despite the fact that this study that the Veterans' Administration, comparative study of hearing aids, was obviously of benefit to everyone, not just to the people they made it for.

Mr. Moorhead. Did you say the Veterans' Administration classified this information?

Mr. Murray. Yes, this was classified. And the Freedom of Information Act had to be used in order to get it, to jar the thing loose.

Mr. Moorhead. How was it classified? Was it classified confidential?

Mr. Murray. I don't remember what the classification was.

Mr. Moss. On that particular case, the committee was contacted and the Veterans' Administration made the material available. It was not classified, it just wasn't available. That seems to be the informal system used in many agencies, just not available.

Mr. Murray. The other case was the one about the ratings of the octane gas. They had to be pried loose, too, instead of being made available immediately.

Now our outstanding cases, the bureaucracies all over the country in the regional areas are simply keeping information from the press that the press should be able to have. I mean this happened in connection with minor details as far as Indian Affairs were concerned, as far as the Arizona Republic is concerned. I don't remember the exact details, but the Arizona Republic, in its last half a dozen years, I am sure every year we have had some kind of a case in which we have either—we haven't had to go to court, we have simply written to the people, cited the law, the law works fine and so on. But my prepared remarks are directed to the possibility of this committee broadening its study to include these kinds of classifications and in some way making the agencies more responsible to undertake disclosure themselves voluntarily of significant information.

Mr. Moorhead. The subcommittee does intend to review the operation and effectiveness of the Freedom of Information Act, although not specifically in connection with these hearings which have been obviously sparked by the security classification problem.

Mr. Murray. Could I ask one question about that? The Freedom of Information Act's first main exception has to do, I think, with national security, doesn't it?

Mr. Moorhead. Yes.

Mr. Murray. And with the executive branch. Now, since this case of the Pentagon papers is directly concerned with exactly this exception, is there a likelihood that that can be reviewed, possibly amended? Is there any recourse there that should be taken?

Mr. Moorhead. Well, you are asking the $64,000 question. That is what we hope to come up with, some recommendations for legislation or other action. One of these was the idea of the independent review board that Mr. Moss referred to. I have also discussed with other witnesses before this committee.

Mr. Perlik, you stated on page 8 of your testimony that a system for classification of documents, particularly must provide for effective challenge of and relief from the decisions of the officials who have the initial responsibilities for administering it. This would be, would it not, Mr. Perlik, the idea of the independent board? Would that satisfy your point?

Mr. PERLIK. Precisely, Mr. Chairman. It goes directly to the heart of declassification, someone doing the second run on documents other than the personnel who did it the first time.

Mr. MOORHEAD. Mr. Callaham, statements have been made in the press that the concealment that seemed to have attended the escalation of the war in Vietnam had disastrous domestic economic effects, because the economic policymakers of our country didn't realize the extent that our involvement was going to be. Therefore, they didn't recommend proper fiscal and monetary policies. There was actually some concealment within the executive branch of the Government. Are you familiar with these statements?

Mr. CALLAHAM. I am not very familiar with it because I am not a professional economist and I don't quite understand it. But I think there is no doubt whatsoever that in the technical economic area some of this information has been withheld to the disadvantage of industries and professionals and other groups that could have used fuller information to their own advantage in their planning.

There are several areas where, of course, I think that industry has suffered in this respect. Aerospace is probably one, and the aircraft industry. Electronics is probably a pretty close second. And there are other areas too. But I am not an expert in this phase of economics.

Mr. MOORHEAD. A witness yesterday proposed that we just revoke Executive Order 10501 and classification be made statutory, with a very narrow definition of what could and could not be classified. Do any of you gentlemen have any opinions on that?

Mr. CALLAHAM. I am inclined to think that would be extremely difficult. The pitfall would be that the definition would be prone to take on a rigidity in time, and change in circumstances would later render it useless or perhaps absurd.

Mr. WILEY. Mr. Chairman, I just want to make one additional comment and not seem to be backing off from the statement I made earlier. I do agree that there must be some review mechanism. I was just citing a general objection to an additional bureaucracy. The more outside the world of bureaucracy that review mechanism is, courts of appeal, if you will, for this sort of problem can be placed, so much the better.

But I don't think you expect to have the Government executives pass judgment on their judgments. This will be a morass from which we will never escape.

In book publishing, I don't think we too freely run into the kinds of problems that are on-going, although we might very well, because I am pretty sure more than one author will be contacted by one or another of our editors to develop some material for university use in connection with this momentous event. But there are some very funny things, and in time of war—I recall an episode during World War II involving a book which was one of the first scientific publications on a new thing called radar. It was a British book and of course the British knew more about it than we and it was published successfully there. We got copies across the Atlantic somehow, and began to distribute it over here.

Very soon we were descended upon by the military saying, "You can't do this. It is a dangerous breach of security." Being good citizens, we withdrew the book from the marketplace, but it was ridiculous, because thousands of copies had been distributed throughout the world,

to the extent that people who could read English and were interested in acquiring it, could. You might think in retrospect that here is an example of our military realizing perhaps that they were far behind, had disregarded the scientists in the United States, and it didn't look very good for this book to be freely circulated.

This is the kind of danger that arises in the area of book publishing.

Mr. Moorhead. Mr. Wiley, does the Government still finance the publishing of private books? I am thinking specifically of the commissioning of books by the U.S. Information Agency for use overseas. At one time they were additional press runs of these books which would end up on book shelfs in the United States without any notation that they were financed by the Government.

Mr. Wiley. Mr. Chairman, I happened to be the book publishers' witness on that momentous occasion when Chairman Fulbright presented the question to the representatives of USIA. I was not asked myself to comment but had he asked me, I would have said our publishing house and virtually every other publishing house was aware of the fallaciousness of that kind of subversion. I would call it almost subversive distribution of propaganda under the guise of free publishing.

When we were approached by USIA representatives, we declined to have anything to do with it. I can't cite other publishers, but I know in our case, I sat there with a sort of comfortable feeling that day.

Mr. Moorhead. I think probably the most important thing we can do—I am not sure that passing laws will solve this—is to try and change the climate in the country and to get the message to the classifiers and those who would suppress documents or information that this is not what the people want. I think that the various cases in court, and this hearing particularly, when it is attended by such distinguished representatives as we have here today, will help to improve that climate.

Mr. Kleeman. Mr. Chairman, I wonder if I might offer what might be a suggestion in the way of a question?

It seems to me yesterday you heard a wise phrase from Mr. Florence, when he said the typical bureaucrat thinks that information is "born classified." I wonder how much thought has been given to the application of computer technology to the declassification process, in the sense that the typical bureaucrat may now be able to operate at his own speed and under his own power would be confronted by a periodic computer presentation of what class of information would become declassified upon what date and he would then have the responsibility thrust on him to prove why this information should not become declassified, or would in a sense—it would automatically become so declassified.

Mr. Moorhead. That is a very interesting observation. He would have to put a date which we could limit by statute or regulation, after which time the computer would automatically spew out the documents in an unclassified or properly programed classification, and then if another person wanted to make an objection, again I think, we would require a review board to make the decision on that challenge.

Mr. Kleeman. Yes.

Mr. Moorhead. Mr. Moss.

Mr. Moss. Mr. Chairman, I suggest that the experience of many people with computers in handling their accounts would perhaps jus-

tify the statement of a professor before one of our committees quite a number of years ago on the "G.I-G.O Doctrine"—"Garbage-in-Garbage-out." And I think there might be real danger if you were to turn this over to a computer of merely compounding it. Instead of getting a political refusal from a bureaucrat, you would find the computer had not yet programed that one for declassification. If you have ever tried to correct an account someone has fouled up on a computer you find it takes them several months to communicate with the computer. You know there is much here.

You said many years ago if we could just change the attitude toward classification, that we would cure the problems of restraint of information, of keeping it from the people, but we haven't succeeded in doing that. At the time the information of 1966 was presented on the floor, I candidly acknowledged that it was a meager first step and really it is. It took 11 years to make that first step. However, in that context it was a giant stride. We did establish the right of judicial review. Unfortunately the judiciary has been extremely timid in undertaking to review classifications. They are inclined in too many of the district courts to look at the classification and accept it on its face. I hope this experience of the last 2 weeks will have jolted them sufficiently so that they will look behind the classifications.

Mr. MURRAY. Mr. Congressman, under the judiciary review, has there been any penalty—isn't the contempt penalty in there?

Mr. Moss. They haven't exercised any.

Mr. MURRAY. In all of the cases there have been?

Mr. Moss. You may recall in 1962 the committee in a report made this recommendation:

> The Committee strongly urges, therefore, that the Defense Department establish administrative penalties for misuse of the security system, for until the generalizations about the public's right to know are backed up by specific rules and regulations, until set penalties are established for abuse of the classification system, fine promises and friendly phrases cannot dispel the fear that information which has no effect on the Nation's security is being hidden by secrecy stamps.

It was true in 1962, it is true today.

This is a phenomenon that has no partisan relationship whatsoever. It has been consistently less—it has produced less candor in the executive branch than it should. I don't think there is a two-way street, Mr. Erlenborn.

I regard the Federal Government as something in which I have an interest. It is responsible to me as a citizen and the executive branch is responsible to me to a larger extent as a Member of the Congress.

The Constitution envisions a congressional oversight. It does not invest directly or indirectly in any manner any oversight over the Congress and the Executive, nor does it intend that the Executive have oversight over the rights of individual citizens. I recall once when the solicitor for the Department of Defense, who was quite irritated at the subcommittee, demanded that we make our files available to him. I will not put on the record what I said to him, but it was pungent and to the point. And he didn't get it.

And I don't think that these are areas where the Government has a right to probe.

Mr. Roberts, I will take the question, because I have been deeply involved in it, of the history of the FCC.

This poses a very difficult problem for the Congress. A broadcast

license immediately, if it is a TV license in any of the top markets today, gives a public resource worth millions and millions of dollars to an individual. He does not pay for it. It imposes a continuing responsibility, and I think there are limits to that responsibility.

In the case of WBBM, the pot party, CBS did not resist the subpena of the committee. It knew exactly what we were after. It knew that the allegation was there that that was a totally manufactured story, one that would never have occurred, no news would have been there had it not been created.

Now, that is the kind of initiative that while we are for free enterprise and free initiative, is not necessarily representative of the highest standards of news reporting. If you create the news, manufacture it, dramatize it, and then report it, it is a little different than creating news that actually exists and would have occurred whether or not there had been any active participation by the broadcaster or the newspaper or the magazine. There were very serious overtones of meddling in foreign affairs to the real detriment of the Government of the United States. The potential was there.

On "The $64,000 Question" and the whole series, months and months of manufactured programs, winners were coached on facial expressions to show how happy they were when they got the right answer, which they had been carefully briefed in advance so that they could not possibly fail to get it. These are different things.

I am not going into the present case. I think it is in a different category than the issues here. But my point is that every part of the media, through information and freedom of information committees, has expressed concern over the years, and whenever an incident has occurred that has created an urgent problem, the expressions have been stronger. But conditions are not going to get better unless the media today is willing to look in on this one and not let up until there is a change in law to prevent the kind of abuses which we all know occur, acknowledged by General Taylor in that statement of his—it was mentioned in one of the statements today—that he doesn't really feel a need to know. They only need to know enough to exercise their responsibilities.

Well, for the general's information, their responsibility is government, and if they are going to govern intelligently they have to know an awful lot, far more than most of them know today. Rather than the Government trying to keep information from them, it should be trying to see they get the fullest information so they can operate and exercise their franchises intelligently.

That is the point that the tremendous bureaucracies forget, that there is a need not only a right, but an absolute need for them to know if they are to exercise their responsibilities.

Now for the first time in this Nation's history we have had prior restraint on the right to publish. I think we must first tackle the system in our courts. I am terribly disturbed over the long delay in getting a final decision out of the courts, so that publication can be resumed. Perhaps the committee, Mr. Chairman, should consider recommending to the House that we state that in any case where the Government seeks to enjoin a first-amendment right that the appeal goes directly from the district court to the Supreme Court. While I think the appeal courts have worked well, in the current controversy it has taken quite a while and we are still waiting to find out whether

the Supreme Court is going to look at it. But we should have direct and immediate access to the Supreme Court on an appeal from an action by a district court involving any first amendment right, without conceding that the Government has a right to enjoin. But if it attempts to, it should go on to the Supreme Court.

I think that the system of classification should be spelled out by statute. The authority to put on a classification should be fixed by statute and there should be a clear justification and penalties for abuse of classification. Because unless we do these things this is going to grow.

The Government gets bigger every day, it doesn't get smaller. It doesn't matter whether it is a Republican or Democrat in the White House, the Government will continue to grow.

Agencies are going to continue to proliferate. And remember at the same time we have a career system building up in classification, experts in security and classification and they have to be kept busy. So we better spell out some very careful guidelines and not let up this time until we achieve the objectives of making order out of the chaos that exists in the whole field of information. And predicate it not on just our first amendment rights, as they are precisely spelled out, but those that are certainly ancillary with them.

If you have the right to speak, then you have to have the right to know or you can't speak intelligently. If you have the right to print, you have to have the right to know or you can't print intelligently. You can't have one without the other.

Dr. Harold Cross laid that out as the clear guideline for this committee when it first started, 16 years ago. It was good advice then, it is very sound advice today.

I think these are the directions in which we are going to have to go. We can talk about individual cases and we can find ones that are ridiculous. The Saturday Evening Post submitting a series of articles to the Defense Department to have them cleared and coming back with a reference to the sinking of the cruiser *Indianapolis* deleted because the Department of the Navy felt it would discourage enlistments, and young men are not supposed to know ships can sink.

At one point we even had a modified form of a crossbow classified, things that, well, if you were writing fiction you wouldn't even dream up, and they occur routinely, far too often in our Government. We have tolerated them far too long. And this should be the very sobering moment of truth that makes us realize that now we have to push on and get a job done. If we don't, we will have another meeting like this in a few years, and some a little later on. In the meantime our rights erode.

Remember, there is a precedence established now. The courts have enjoined; they have imposed prior restraint. The Government did finally dare to go out and seek the order. That is a precedent. That is an erosion of the first amendment right.

As I have stated several times in these hearings, if it can be done in the exercise of the right to publish, we can be enjoined from the right to speak and from the right to worship and I think that gets to be a very sorry situation, one which endangers the very foundation of this Republic.

After all, our difference from other nations is pretty well focused

on that first amendment. Destroy it or erode it and we are much less different than we would like to think we are.

I want to express my appreciation for the appearance of the witnesses. I think the testimony has been excellent.

Mr. MOORHEAD. Mr. Wiley, did you want to comment?

Mr. WILEY. It just occurs to me, Mr. Chairman, that part of the difficulty in the bureaucracy, which is common to business as well as to government I assure you, is that our bureaucracy tends not to have a sense of humor. And we have found, what I am sure again is common to many business organizations, that when we want to communicate something quickly within the organization, we do not address it to the staff, we address it to a limited distribution list without placing classification on the information. It will be read immediately, discussed, and understood.

I think part of the problem with classification and the negative results, is that a lot of things that really ought to be known, somehow or other in the minds of a biased narrowminded person, maybe even an ignorant person who exercises that right, is so important to him he can't conceive of it being unimportant to someone else, including our friends and allies outside of the United States. So I would commend a sense of humor somewhere along the way.

Mr. MOORHEAD. Mr. Florence testified there was an ego factor at work in overclassification. It made the person handling the paper feel more important if it was "Top Secret" than if it was declassified or only "Confidential."

Mr. Erlenborn.

Mr. ERLENBORN. Thank you, Mr. Chairman. Let me just ask one or two other questions.

How do you, as a panel, feel about the use of the fruit of a crime in publication, rather than just the Times situation or the "Pentagon Papers," because I am not certain there was theft or crime there? Let's say the *Senator Dodd* case, where papers were taken from his office and then used as a basis of a news story. I am sure there are other examples. What is your feeling about the use of the fruit of the crime?

Mr. MURRAY. I think the answer is classic. The first amendment takes precedence and you judge the situation on whether the information is important for the people to know, and I think editors sometimes don't take enough responsibility concerning the second aspect, which is the fruit of the crime. They take responsibility for the first aspect, which is this first amendment right and responsibility to judge the information. And it is a good question and it is a difficult question and it comes up all of the time.

Mr. Moss. Would you yield, Mr. Erlenborn?

Mr. ERLENBORN. Yes; I would be happy to yield.

Mr. Moss. We had a case in the Interstate and Foreign Commerce Committee, the Special Committee on Oversight. Our chief counsels took the files of the committee and delivered them to Senator Morse and Mr. Mollenhoff, who was here a little earlier, and the committee exhaustively explored the possible actions it might take and concluded it could do nothing.

Mr. ERLENBORN. Yes. Mr. Moss also made reference in his statement to manufactured news, news that would not have been news had it not been manufactured for the purpose of publication. It brought to my

mind something I am sure must be discussed among editors and people in the field of publication, television, radio, and that is, the fact that today people who are willing to engage in outrageous actions, dress in a strange fashion, or undress completely on the steps of the Capitol, are the ones who get attention and make the news and the fact that they do get that attention brings on that sort of outrageous action. What is your feeling about this? Should there be some restraint on the part of the press as to reporting this sort of thing, so you are not encouraging this as a mode of expression? It is sort of manufactured news in a sense.

Mr. ROBERTS. I consider almost any news conference or scheduled appearance as manufactured news. This is where editorial judgment again has to apply. And believe me, in our little organization we have almost daily arguments as to whether we should cover this or that event, what relation it will have to the people we are trying to serve in terms of getting information to them, whether it will really be valuable. We try to find out as much as we can in advance as to what really is going to happen and try to avoid the events that we feel are really, in the sense you are talking about, really staged.

Mr. MURRAY. This is a two-way street all right here, because you see Government is manufacturing news and if it were coming into another presidential election a great deal of political news will be manufactured by the politicians deliberately, using possibly some of the outrageous methods you were deploring on the part of some of the younger generation probably. This is a very interesting area.

Congressman Moss was pretty rough on the radio and television, and since I don't have any conflict of interest there, I can say that news in the last 20 years has become show business to a degree. And this is a problem for television as well as it is for the public and for Government.

But what CBS did in connection with the pot party and in connection with Haiti takes a pretty careful examination. You have to consider—I am not condoning what they did. I simply know both cases very well. You have to look at the intent.

The pot party was what, several years ago now, and the drug thing has continued to explode in the society. The intent of filming a marihuana party was, I don't think, a competitive attempt to simply spread drugs by any means. I would be sure that the intent was as much educational as it was to have competitive TV.

And I think that the situation in Haiti is even more difficult. But as I understand it, this was a question of trying to insure coverage of a situation and then you got into a very fine area as to who had the publication rights and the publication rights were paid for ahead of time to pay for the invasion, unless I am mistaken. I am not certain about that. All I am saying is this is an area where the condemnation of the press—we have to be a little careful, because there are a lot of implications in my opinion and I feel motivated to make the comment because so much on the Government's side also tends to be staged and tends to need a very critical view by the press.

Mr. ERLENBORN. I am reminded in your reference to looking to the intent of a personal experience of meeting a priest who had been my religious instructor in school—back during the days of the Army-McCarthy hearings—and he happened to be quite a conservative individual, this priest. I was deploring to him the fact that Senator

McCarthy had used a doctored photograph to make a point that these two people were alone together when as a matter of fact the original photograph was a group photograph.

This priest said to me "But he is fighting Communists and you have to use different methods," and I asked "Father, do you really mean to tell me after all of these years the end does justify the means?" I think I can make the same observation to your comment that we should look at the intent.

I think we can't adopt the idea that the end does justify the means.

Mr. WILEY. Mr. Erlenborn, I referred in my testimony, and I suppose since to press conferences. Those press conferences I arranged to have in the countries I visited, and the same was true on another occasion when I was in India, it was for one simple purpose, not to get my name and picture in the newspaper, who cares in those countries—I am gone tomorrow and they don't know who I am anyway—but rather to put before the widest possible public in those countries, where freedom to publish is either not available or is under severe attack and maybe will be lost, and that was the purpose.

Now, yes, manufactured. The press officer of the U.S. Embassy in each instance made the arrangements and in one instance one of the employees of the Embassy in Santiago acted as the translator. But the purpose, however manufactured, I felt was entirely justified. It was extolling the virtues of freedom and the fact that in the United States, I thought, the first amendment was an absolute ironclad guarantee.

In the case of India, it was a little different, because there you have a problem of a country where they are not sure there should be such a thing as private enterprise publishing and it is therefore frequently under attack. The morale of the publishers is badly shaken. And if one of us goes and holds one-man seminars and press conferences, this helps them to fight their own battle, which we cannot fight for them.

Mr. ERLENBORN. I certainly would agree with that. I hardly would put a press conference in the category of manufactured news. I am not commenting on that sort of thing.

Mr. MOORHEAD. The gentleman wouldn't want to abolish press conferences?

Mr. ERLENBORN. Absolutely not.

Mr. MOORHEAD. I think Mr. Callaham wanted to comment.

Mr. CALLAHAM. Yes; I agree with what Mr. Wiley pointed out. I think we are in an area of very tricky semantics: managed news, creative news, versus fabricated news. The news that is managed or created, to my way of thinking (in my semantics) has a basis in fact and therefore has legitimacy. But fabricated news, in my opinion, has no basis in fact and therefore is not legitimate. And every editor has the responsibility, the awesome responsibility to avoid any fabrication or any misrepresentation of facts. But I do not put the press conference, which could be considered the creation or management of news, that might otherwise never appear into the category of fabricated news. You might say the very meeting of this committee is a creation of news in the sense that if it were not brought together, if we were not here, whatever we say could never be considered as news because it would not be said.

Mr. MOORHEAD. I think this is a very valid distinction between the creation and fabrication.

Mr. WILEY. The statement I made, Mr. Chairman, at the annual meeting of our association on April 28, never made the press. I am very glad for that to be before your committee, because I still believe it was something that should have been said and it turns out to be much more important in retrospect than I realized at the time, not because I said it, anyone could have said it.

Mr. MOORHEAD. I think what has been said here by this panel is something that needed to be said. I probably share Mr. Moss' pessimistic thinking that we may be back here in the future saying this all over again. But let's hope we can at least reduce the chance of having to have this kind of a hearing in the future.

Any other questions?

Any further comments from the witnesses?

(No response.)

Mr. MOORHEAD. I have received a letter from Mr. Mason W. Gross, chairman, National Book Committee, Inc., which will be inserted in the record at this point.

(The letter referred to follows:)

NATIONAL BOOK COMMITTEE, INC.,
New York, N.Y., June 24, 1971.

HON. WILLIAM S. MOORHEAD,
Chairman, House Subcommittee on Foreign Operations and Government Information, Rayburn House Office Building, Washington, D.C.

DEAR MR. MOORHEAD: The National Book Committee, committed to the defense of intellectual freedom, believes that the widest possible access to information is necessary to maintain the enlightened citizenry essential to an effective operating democracy. The decision of the New York Times and other media to publish the Pentagon's historical documentation of U.S. involvement in Southeast Asia is wholly consistent with that belief.

The freedom to publish without prior restraint is absolutely essential to the exercise of first amendment rights. It is on these rights that the survival of American democracy rests.

Very truly yours,

MASON W. GROSS, *Chairman.*

Mr. MOORHEAD. These hearings are about to close today then. The hearings will resume at 10 a.m. Monday, June 28, in the Government Operations Committee, room 2154, Rayburn House Office Building.

The morning and afternoon witnesses will include Miss Susanna McBee, Washington editor, McCalls publications. She is also first vice president of the Press Club of Washington. Mr. Julius Epstein, historian, Hoover Institute, Stanford University, Stanford, Calif. Mr. David Wise, Woodrow Wilson International Center for Scholars, Smithsonian, Washington, D.C. and Benny L. Kass, attorney, former counsel, Foreign Operations and Government Information Subcommittee, Washington, D.C.

Hearings will continue Tuesday and Wednesday in the same room beginning at 10 a.m. each day and continue in the afternoon.

Tuesday we will hear from executive department witnesses; Wednesday we will have a number of outside witnesses, including Mr. Clark Mollenhoff of the Des Moines Register and Prof. Philip Kurland of the Chicago University Law School.

The subcommittee stands adjourned until Monday morning at 10 o'clock.

(Whereupon, at 1 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Monday, June 28, 1971.)

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